(15)

No. 89-1838-CFX
Status: GRANTED

Title: Equal Employment Opportunity Commission, Petitioner
v.
Arabian American Oil Company and Aramco Services Company

Docketed:
May 23, 1990

Court: United States Court of Appeals
for the Fifth Circuit

Vide:
89-1845

Counsel for petitioner: Solicitor General

Counsel for respondent: Friedman,Paul L., Birnberg,Gerald, Roady,John D.

042490 ext. until 052390 by White, J.-CITED NOTE: 2nd respond shld be as above

Entry	Date	Note	Proceedings and Orders
1	Apr 23 1990	G	Application (A89-743) to extend the time to file a petition for a writ of certiorari from May 3, 1990 to May 23, 1990, submitted to Justice White.
2	Apr 24 1990		Application (A89-743) granted by Justice White extending the time to file until May 23, 1990.
3	May 23 1990	G	Petition for writ of certiorari filed.
4	Jun 22 1990		Brief of respondent Arabian American Oil Co. and Aramco Services Co. in opposition filed. VIDED.
5	Jun 26 1990		DISTRIBUTED. September 24, 1990
6	Jul 2 1990	X	Reply brief of petitioner EEOC filed.
7	Oct 1 1990		Petition GRANTED. The case is consolidated with 89-1845, and a total of one hour is allotted for oral argument. **********
8	Oct 23 1990	*	Record filed. Certified copy of C. A. Proceedings, 4 volumes, received. (Vide: 89-1845).
9	Nov 15 1990		Brief amici curiae of NAACP Legal Defense Fund, et al. filed. VIDED.
10	Nov 15 1990		Brief of petitioner EEOC filed. VIDED.
11	Nov 15 1990		Joint appendix filed. VIDED.
12	Nov 15 1990		Brief amicus curiae of Lawyers' Committee for Civil Rights Under Law filed. VIDED.
15	Nov 15 1990		Brief amici curiae of ACLU, et al. filed. VIDED.
14	Nov 23 1990		SET FOR ARGUMENT WEDNESDAY, JANUARY 16, 1991. (1ST CASE)
16	Nov 29 1990		CIRCULATED.
17	Dec 17 1990	X	Brief of respondents Arabian American Oil Co. and Aramco Services Co. filed. VIDED.
18	Dec 17 1990		Lodging received.
19	Dec 17 1990	X	Brief amicus curiae of Equal Employment Advisory Council filed. VIDED.
20	Dec 17 1990		Brief amici curiae of Rule of Law Committee, et al. filed. VIDED.
21	Dec 17 1990	X	Brief amicus curiae of Washington Legal Foundation filed. VIDED.
22	Dec 17 1990	X	Brief amicus curiae of Society For Human Resources Management filed. VIDED.
23	Jan 9 1991	X	Reply brief of petitioner EEOC filed. VIDED.

No. 89-1838-CFX

Entry	Date	Note	Proceedings and Orders
24	Jan 16 1991		ARGUED.

89-1888

No. (1)

FILED
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In the Supreme Court of the United States

OCTOBER TERM, 1989

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, PETITIONER

v.

ARABIAN AMERICAN OIL CO., ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

KENNETH W. STARR
Solicitor General

JOHN R. DUNNE
Assistant Attorney General

JOHN G. ROBERTS, JR.
Deputy Solicitor General

STEPHEN L. NIGHTINGALE
Assistant to the Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

CHARLES A. SHANOR
General Counsel

GWENDOLYN YOUNG REAMS
Associate General Counsel

VINCENT J. BLACKWOOD
Assistant General Counsel

SAMUEL A. MARCOSSON
Attorney
Equal Employment Opportunity Commission
Washington, D.C. 20507

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QUESTION PRESENTED

Whether Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, prohibits employment discrimination outside the United States by an American corporation against an American citizen.

PARTIES TO THE PROCEEDING

The petitioner, which was granted leave to intervene in this action while it was pending in the court of appeals, is the Equal Employment Opportunity Commission. The other parties are plaintiff Ali Boureslan and defendants Arabian American Oil Company and Aramco Services Company.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	2
Statutory provisions involved	2
Statement	2
Reasons for granting the petition	5
Conclusion	18
Appendix A	1a
Appendix B	28a
Appendix C	77a
Appendix D	83a
Appendix E	85a
Appendix F	86a

TABLE OF AUTHORITIES

Cases:

Alexander v. *Gardner-Denver Co.*, 415 U.S. 36 (1974)	16
Andrus v. *Glover Constr. Co.*, 446 U.S. 608 (1980)	9
Argentine Republic v. *Amerada Hess Shipping Corp.*, 109 S. Ct. 683 (1989)	7
Benz v. *Compania Naviera Hidalgo, S.A.*, 353 U.S. 138 (1957)	11
Blackmer v. *United States*, 284 U.S. 421 (1932)	6
Brown v. *Marsh*, 777 F.2d 8 (D.C. Cir. 1985)	6
Bryant v. *International Schools Servs., Inc.*, 502 F. Supp. 472 (D.N.J. 1980), rev'd, 675 F.2d 562 (3d Cir. 1982)	14
Cleary v. *United States Lines, Inc.*, 728 F.2d 607 (3d Cir. 1984)	12
Espinoza v. *Farah Mfg. Co.*, 414 U.S. 86 (1973)	4, 10
Foley Bros. v. *Filardo*, 336 U.S. 281 (1949)	3, 6, 7, 8, 11
Lavrov v. *NCR Corp.*, 600 F. Supp. 923 (S.D. Ohio 1984)	14

Cases—Continued: Page

Love v. *Pullman Co.*, 13 Fair Empl. Prac. Cas. (BNA) 423 (D. Colo. 1976), aff'd, 569 F.2d 1074 (10th Cir. 1978) 14
McCulloch v. *Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10 (1963) 6, 7, 11
Murray v. *Schooner Charming Besty*, 6 U.S. (2 Cranch) 64 (1804) 7
Pfeiffer v. *Wm. Wrigley Jr. Co.*, 755 F.2d 554 (7th Cir. 1985) 12
Psimenos v. *E.F. Hutton & Co.*, 722 F.2d 1041 (2d Cir. 1983) 7
Seville v. *Martin Marietta Corp.*, 638 F. Supp. 590 (D. Md. 1986) 14
Steele v. *Bulova Watch Co.*, 344 U.S. 280 (1952) .. 6, 7, 9
United States v. *Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945) 6-7
Vermilya-Brown Co. v. *Connell*, 335 U.S. 377 (1948) 6, 11
Zahourek v. *Arthur Young & Co.*, 750 F.2d 827 (10th Cir. 1984) 12

Statutes and regulations:

Age Discrimination in Employment Act of 1967, 29 U.S.C. 621 *et seq.*:
29 U.S.C. 623(a) 7
29 U.S.C. 623(f)(1) 12-13
29 U.S.C. 623(h) 12-13
29 U.S.C. 630(f) 7, 12
Civil Rights Act of 1964, Title VII, 42 U.S.C. 2000e *et seq.* 2
§ 701(b), 42 U.S.C. 2000e(b) 8, 86a
§ 701(g), 42 U.S.C. 2000e(g) 8, 86a-87a
§ 701(h), 42 U.S.C. 2000e(h) 8, 87a
§ 702, 42 U.S.C. 2000e-1 ..... 4, 9, 87a
§ 703, 42 U.S.C. 2000e-2 ..... 10, 87a-88a
§ 706(f)(1), 42 U.S.C. 2000e-5(f)(1) 3
§ 717, 42 U.S.C. 2000e-16 16

Miscellaneous: Page

Age Discrimination and Overseas Americans, 1983: Hearing Before the Subcomm. on Aging of the Senate Comm. on Labor and Human Resources, 98th Cong., 1st Sess. (1983) 13
Civil Rights: Hearings on H.R. 7152 Before Subcomm. No. 5 of the House Comm. on the Judiciary, 88th Cong., 1st Sess. (1963) 11
129 Cong. Rec. 34,499 (1983) 13
Decision No. 85-16, Emp. Prac. Dec. (CCH) ¶ 6856 (1985) 15
Discriminatory Arab Pressure on U.S. Business: Hearings Before the Subcomm. on International Trade and Commerce of the House Comm. on International Relations, 94th Cong., 1st Sess. (1975) 16
Discriminatory Overseas Assignment Policies of Federal Agencies: Hearings Before a Subcomm. on the House Comm. on Government Operations, 94th Cong., 1st & 2d Sess. (1975-1976) 16
Foreign Investment and Arab Boycott Legislation: Hearings Before the Subcomm. on International Finance of the Senate Comm. on Banking, Housing and Urban Affairs, 94th Cong., 1st Sess. (1975) 15-16
H.R. 4453, 81st Cong., 1st Sess. (1949) 11
H.R. 405, 88th Cong., 1st Sess. (1963) 11
H.R. 7152, 88th Cong., 2d Sess. (1963) 11
H.R. Rep. No. 570, 88th Cong., 1st Sess. (1963) 10-11
Policy Statement No. N-915.033, EEOC Compl. Man. (CCH) ¶ 2164 (1988) 15
The World Almanac and Book of Facts: 1990 (1989) 16

In the Supreme Court of the United States

OCTOBER TERM, 1989

No.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, PETITIONER

v.

ARABIAN AMERICAN OIL CO., ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Solicitor General, on behalf of the Equal Employment Opportunity Commission, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The panel and en banc opinions of the court of appeals (App., *infra*, 1a-76a) are reported, respectively, at 857 F.2d 1014 and 892 F.2d 1271. The opinion of the district court (App., *infra*, 77a-82a) is reported at 653 F. Supp. 629.

JURISDICTION

The judgment of the court of appeals upon rehearing en banc was entered on February 2, 1990. On April 24, 1990, Justice White extended the time for filing a petition for a writ of certiorari to and including May 23, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, are set forth at App. *infra*, 86a-88a.

STATEMENT

1. Ali Boureslan, the plaintiff in this Title VII action, is a naturalized American citizen who was born in Lebanon. The defendants are two Delaware corporations, Arabian American Oil Company (Aramco) and its subsidiary, Aramco Services Company (ASC). Aramco explores, produces, and refines oil and gas in Saudi Arabia. Its principal place of business is Dhahran, Saudi Arabia, and it is licensed to do business in Texas. ASC's principal place of business is Houston, Texas. App., *infra*, 29a-30a.

In 1979, Boureslan began working as an engineer for ASC in Houston. A year later, his request for a transfer to Aramco was granted, and he relocated to Saudi Arabia. In that country, Boureslan alleges, his supervisor subjected him to a "campaign of harassment," including racial, religious, and ethnic slurs, culminating in his termination on June 16, 1984. App., *infra*, 29a-30a.

2. After filing a charge of discrimination against Aramco with the Equal Employment Opportunity

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Commission, Boureslan commenced this lawsuit against Aramco and ASC. His complaint seeks relief under Title VII and also asserts pendent state law claims. See App., *infra*, 30a. Aramco and ASC moved to dismiss the complaint for lack of subject matter jurisdiction, arguing that Title VII does not apply to discrimination outside the United States. The district court agreed and dismissed the Title VII claim. *Id.* at 77a-82a. It also dismissed Boureslan's state law claims for lack of pendent jurisdiction and entered final judgment in favor of both defendants. See *id.* at 82a.

2. A divided panel of the court of appeals affirmed. App., *infra*, 28a-82a. The court granted rehearing en banc; upon rehearing, the court affirmed by a 9-5 vote. *Id.* at 1a-27a.[1]

a. The en banc majority noted that this Court has recognized a "canon of construction * * * that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States." App., *infra*, 3a (quoting *Foley Bros.* v. *Filardo*, 336 U.S. 281, 285 (1949)). Title VII, the majority held, "does not reflect the necessary clear expression of congressional intent to extend its reach beyond our borders." App., *infra*, 7a.

The majority rejected the contention that the statute's "alien exemption"—which provides that Title VII "shall not apply to an employer with respect to

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[1] In the court of appeals, the EEOC participated as an amicus curiae before the panel. After entry of the panel's decision, the Commission was granted leave to intervene for the purpose of seeking further review and participated as a party in the rehearing. App., *infra*, 85a. See 42 U.S.C. 2000e-5(f)(1) (authorizing court, in its discretion, to permit the Commission to intervene in a civil action upon the Commission's certification that the case is of general public importance).

employment of aliens outside any State," 42 U.S.C. 2000e-1—would be superfluous unless Title VII otherwise applies to discrimination outside the United States. The majority observed that "no one disputes that the provision excludes coverage to aliens employed outside the states"; it added, citing *Espinoza* v. *Farah Mfg. Co.*, 414 U.S. 86, 95 (1973), that the alien exemption can also meaningfully be read to reflect "a congressional intent to provide Title VII coverage to aliens employed *within* the United States." App., *infra*, 4a.

The majority characterized Title VII as having a "domestic focus"—reflected in the Act's references to the "United States", "states" and "state proceedings." App., *infra*, 5a. Noting that Title VII "accommodate[s] state employment discrimination proceedings," the majority suggested that "[i]f Congress had intended the Act to apply in foreign countries," it would "have been even more careful to address conflicts with foreign discrimination laws." *Ibid.* The majority also found the Act "curiously silent" on issues that would be raised by extraterritorial application of Title VII: specifically, the appropriate venue for an action arising out of discrimination abroad and, given that the Commission's subpoena power is limited to evidence in the United States and its territories, the means by which the Commission could investigate such claims. *Ibid.* Finally, the majority suggested that, if the Act were applied extraterritorially, its plain language would reach foreign employers that employed American citizens. The majority expressed doubt "that Congress ever intended to impose Title VII on a foreign employer who had the grace to employ an American citizen in its own country." *Id.* at 6a.

b. The dissenting members of the court would have held that "a fair and reasonable reading" of Title VII "compels the conclusion that Congress did, in fact, intend Title VII's broad remedial goals to encompass, and eradicate, an American employer's discriminatory employment practices against a United States citizen, even if the acts constituting such discrimination were carried out on foreign soil." App., *infra*, 7a. The dissent maintained that the alien exemption provides a clear expression of Congress's intent to apply the statute extraterritorially, reasoning that "[i]f Congress had not envisioned an extraterritorial application of Title VII, a specific provision exempting only aliens from such coverage would not have been needed." *Id.* at 9a. The dissent found further support for its understanding of the alien exemption in that provision's legislative history, the EEOC's administrative interpretation of Title VII, and this Court's analysis in *Foley Bros.* *Id.* at 12a-16a & nn.3-7.

REASONS FOR GRANTING THE PETITION

The court of appeals' interpretation of Title VII would withdraw the Act's protection from the many Americans who spend a portion of their careers abroad. That interpretation is not justified by Title VII's language or the well-recognized presumption against the extraterritorial application of federal statutes. By its terms, Title VII reaches discrimination outside the United States, and the statute contains an exemption—for aliens working outside of any State—that would be entirely superfluous if the Act did not apply abroad in the first place. The EEOC, which is charged with administration of Title VII, has construed the statute to apply to discrimina-

tion abroad by American corporations against American citizens. Although there is no conflict among the circuits on this question, every district court that had addressed this issue prior to the decision in this case had reached the same conclusion as the Commission.

The court of appeals' interpretation of Title VII would leave a serious gap in the statute's prohibition against invidious employment discrimination. Many Americans work abroad for at least some part of their careers. Indeed, in many multinational firms, experience in overseas operations is instrumental to advancement. Under the court of appeals' view of the statute, employees accepting overseas assignments would expose themselves to discrimination abroad, and the effects of that discrimination would be felt in employment decisions in this country.

1. Congress undoubtedly has authority to prohibit employment discrimination by American corporations operating abroad. "While the legislation of the Congress, unless the contrary intent appears, is construed to apply only within the territorial jurisdiction of the United States, the question of its application, so far as citizens of the United States in foreign countries is concerned, is one of construction, not of legislative power." *Blackmer* v. *United States*, 284 U.S. 421, 437 (1932).[2] Congress has often exercised its authority to extend the reach of its legislation beyond our borders—for instance, in the antitrust, securities, and trademark laws.[3] Indeed, in the

[2] Accord, *e.g.*, *Vermilya-Brown Co.* v. *Connell*, 335 U.S. 377, 381 (1948); *Foley Bros.* v. *Filardo*, 336 U.S. 281, 284-285 (1949); *Steele* v. *Bulova Watch Co.*, 344 U.S. 280, 285-286 (1952); *McCulloch* v. *Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 17 (1963).

[3] See, *e.g.*, *Steele* v. *Bulova Watch Co.*, 344 U.S. 280 (1952) (Lanham Act); *United States* v. *Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945) (antitrust laws); *Psimenos* v. *E.F. Hutton & Co.*, 722 F.2d 1041 (2d Cir. 1983) (securities laws).

area of employment discrimination, Congress recently amended the Age Discrimination in Employment Act of 1967 to prohibit age discrimination against American citizens outside the United States. 29 U.S.C. 623(a), 630(f); see pp. 12-13, *infra*.

This Court, of course, has recognized a canon of construction "which teaches that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States." *E.g.*, *Foley Bros.* v. *Filardo*, 336 U.S. 281, 285 (1949).[4] That canon "is based on the assumption that Congress is primarily concerned with domestic conditions," *ibid.*; it also serves to protect against unintended conflicts between our laws and those of other nations and resulting international discord, cf. *McCulloch* v. *Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 21-22 (1963). At bottom, however, the issue remains one of legislative intent; the presumption against the extraterritorial application of American statutes is "a valid

[4] See *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 109 S.Ct. 683, 691 (1989); *Steele* v. *Bulova Watch Co.*, 344 U.S. 280, 285 (1952).

Where the application of an American statute would violate international law, a more stringent variant of the presumption applies. "[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains." *Murray* v. *Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804). See *McCulloch* v. *Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 21-22 (1963). It would not violate international law to apply Title VII to American citizens employed by American firms outside the United States.

approach whereby unexpressed congressional intent may be ascertained." *Foley Bros.*, 336 U.S. at 285.

The language and legislative history of Title VII are sufficient to rebut the presumption; this is not a case in which Congress's intent to apply a statute abroad was "unexpressed." Title VII's language and legislative history, considered in proper context, affirmatively manifest Congress's intention to prohibit discrimination by American firms against American citizens abroad.

a. By its terms, Title VII applies to employers (with a specified number of employees) that are "engaged in an industry affecting commerce." 42 U.S.C. 2000e(b).[5] Significantly, "commerce" is defined to include both interstate and foreign commerce: for purposes of Title VII, it encompasses "trade, traffic, commerce, transportation, transmission, or communication among the several States; *or between a State and any place outside thereof*; or within the District of Columbia, or a possession of the United States; or between points in the same State but through a point outside thereof." 42 U.S.C. 2000e(g) (emphasis added). Nothing in this language suggests that the Act applies only within the borders of the United States. Indeed, the provisions that determine Title VII's scope are similar to the "broad jurisdictional grant in the Lanham Act" on which this Court relied in holding that that statute applies outside this country. See *Steele* v. *Bulova Watch Co.*, 344 U.S. at 286.

[5] An "industry affecting commerce" is (42 U.S.C. 2000e(h))

> any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce and includes any activity or industry "affecting commerce" within the meaning of the Labor-Management Reporting and Disclosure Act of 1959 [29 U.S.C. 401 et seq.] and further includes any governmental industry, business, or activity.

In addition, Title VII includes an exemption that confirms Congress's intent to extend Title VII's protection to American citizens working abroad. Section 702 of the Act, 42 U.S.C. 2000e-1, provides that the statute "shall not apply to an employer with respect to *the employment of aliens outside any State*" (emphasis added). If (as the court of appeals held in this case) Title VII does not apply to discrimination outside the United States in the first place, this exemption is completely gratuitous. Congress would have had no reason to exempt aliens employed abroad unless—like the religious employers that Section 702 also exempts—those aliens would otherwise have been covered by the statute. Aliens employed "outside any State" would only otherwise be covered, however, if Title VII applies extraterritorially.

As the dissent stressed, the import of the alien exemption is inescapable (App., *infra*, 9a):

> [B]y specifically providing an exemption for employers regarding the extraterritorial employment of "aliens," without providing a similar exemption as to the corresponding category of "citizens," Congress intended that American employees would be covered under Title VII.

Cf. *Andrus* v. *Glover Constr. Co.*, 446 U.S. 608, 616-617 (1980) ("Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent.").[6]

[6] The majority of the court of appeals offered no plausible explanation of the role the alien exemption might play under its construction of the statute. The majority's observation

b. The legislative history of the alien exemption confirms Congress's intention to extend Title VII's protection to American citizens employed by American firms abroad. A committee report explained that the exemption's purpose is "to remove conflicts of law which might otherwise exist between the United States and a foreign nation in the employment of aliens outside the United States by an American enterprise." H.R. Rep. No. 570, 88th Cong., 1st

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that "no one disputes that the provision excludes coverage to aliens employed outside the states" (App., *infra*, 4a) is beside the point. The issue is not whether the exemption means what it says (we have no doubt that it does), but why such a provision would have been included if the statute were not intended to apply abroad in the first place. Nor is there merit to the majority's suggestion that the alien exemption can be given meaning as a grant of coverage to aliens employed in the United States; Congress could not have intended to employ an *exemption* to extend Title VII's coverage to that group. See *Espinoza* v. *Farah Mfg. Co.*, 414 U.S. at 95 (alien employed in this country is protected by virtue of being an "individual" referred to in Section 703 of the Act, 42 U.S.C. 2000e-2).

Although (as this Court noted in *Espinoza*) the alien exemption is undoubtedly indicative of Congress's intent to cover aliens within the United States, the Court clearly did not suggest that this was the exemption's only significance. In fact, there is a precise parallel between the inference this Court drew in *Espinoza* and the inference that we urge in this case. In each instance, the fact that the Act specifically exempts aliens employed outside the United States demonstrates that a related group outside the exemption—in *Espinoza*, aliens employed *inside* the United States and, here, *citizens* employed abroad—is covered. Far from rejecting the inference on which we rely here, *Espinoza* establishes that it is appropriate to refer to the exemption as a means of ascertaining Congress's intent with respect to Title VII's coverage.

Sess. 4 (1963).[7] Plainly, Congress would have had no occasion to *remove* conflicts of law arising from the employment of aliens outside the United States unless it contemplated that the Act would apply extraterritorially.

c. Although Title VII regulates the relationship between employer and employee, and thus operates in a field in which other statutes have been held not to apply extraterritorially,[8] the statute's subject mat-

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[7] This report addressed H.R. 405, 88th Cong., 1st Sess. (1963). That bill was subsequently incorporated in H.R. 7152, 88th Cong., 2d Sess. (1963), which in turn was ultimately enacted, as amended, as Title VII. The report on H.R. 405 was made part of the record of the hearings on H.R. 7152. See *Civil Rights: Hearings on H.R. 7152 Before Subcomm. No. 5 of the House Comm. on the Judiciary*, 88th Cong., 1st Sess. 2303 (1963).

H.R. 405 was one of a series of fair employment bills considered by the House Committee on Education and Labor. The first to contain an alien exemption, H.R. 4453, 81st Cong., 1st Sess. (1949), was introduced by Adam Clayton Powell on April 29, 1949. Six weeks earlier, in holding that the Eight Hour Law did not apply outside the United States, this Court had placed particular stress on "[t]he absence of any distinction between citizen and alien labor." *Foley Bros.* v. *Filardo*, 336 U.S. at 286. It seems likely that H.R. 4453 was drafted to meet the concern expressed in *Foley Bros.*—that is, to draw the distinction found lacking in *Foley Bros.* so as to remove that perceived impediment to extraterritorial application.

[8] See *McCulloch* v. *Sociedad Nacional de Marineros de Honduras*, *supra* (NLRA does not apply to seamen aboard foreign flag vessels owned by foreign subsidiary of American corporation); *Benz* v. *Compania Naviera Hidalgo, S.A.*, 353 U.S. 138 (1957) (LMRA does not apply to picketing of foreign ship operated entirely by foreign seamen under foreign articles); *Foley Bros.* v. *Filardo*, *supra* (Eight Hour Law does not apply to government contracts performed in Iran). But cf. *Vermilya-Brown Co.* v. *Connell*, *supra* ("pos-

ter provides no basis for questioning Congress's intention to attack discrimination abroad against American citizens by American employers. In essence, Title VII prohibits discrimination against one or more individuals by an employer, as opposed to regulating the relations between the employer and its employees generally. There is nothing unusual in the idea that Congress's concern about this type of individual injury—or its determination to provide a remedy—extends outside the United States.

Congress's willingness to extend the ADEA's prohibition on age discrimination beyond our borders underscores its willingness to strike at discrimination against American citizens by American employers abroad. In 1984, after several courts of appeals had held that the ADEA did not apply abroad,[9] Congress amended that statute's definition of employee to include "any individual who is a citizen of the United States employed by an employer in a workplace in a foreign country," 29 U.S.C. 630(f), and specified the employers to which the Act would apply, 29

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sessions" of the United States that are subject to the FLSA include bases leased from Great Britain). Significantly, none of the statutes which were held not to apply extraterritorially was limited by its terms to American citizens, posing particular problems if the statute were interpreted to apply abroad. Title VII is so limited.

[9] *Zahourek* v. *Arthur Young & Co.*, 750 F.2d 827 (10th Cir. 1984); *Cleary* v. *United States Lines, Inc.*, 728 F.2d 607 (3d Cir. 1984). See *Pfeiffer* v. *Wm. Wrigley Jr. Co.*, 755 F.2d 554 (7th Cir. 1985). As these courts noted, the ADEA has no provision comparable to Title VII's alien exemption. Further, unlike Title VII, the ADEA incorporates provisions of the FLSA, including a provision expressly excluding work performed in a workplace in a foreign country from the FLSA.

U.S.C. 623(f)(1) and (h). Supporters of this legislation emphasized that these amendments were appropriate to conform the ADEA's prohibition on age discrimination to the equivalent provisions of Title VII. The Senate sponsor of the ADEA amendments noted that "the substantive prohibitions of the [ADEA] are worded nearly exactly as those in title VII, which at least two district courts have held does apply abroad," and argued that his proposed amendment would "clear[] up an anomaly" that "Congress never intended." 129 Cong. Rec. 34,499 (1983) (remarks of Sen. Grassley).[10]

The court of appeals' interpretation of Title VII would create a similar anomaly. Americans employed overseas would be protected from age discrimination, but not from discrimination based upon race, sex, religion, or national origin. The language of Title VII—including its general jurisdictional provisions and the alien exemption—forecloses attributing such an odd result to Congress.

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[10] Similarly, during hearings on the proposed legislation, the EEOC's Chairman testified that Title VII had been construed to apply to discrimination outside of the United States. See *Age Discrimination and Overseas Americans, 1983: Hearing Before the Subcomm. on Aging of the Senate Comm. on Labor and Human Resources*, 98th Cong., 1st Sess. 2-4 (1983) (testimony of Clarence Thomas).

We do not suggest that the legislative history of the 1984 ADEA amendments is indicative of the intent of the 1964 Congress that enacted Title VII. However, that history lays to rest the majority's suggestion (App., *infra*, 6a) that differences in the language of the ADEA and Title VII justify attributing an intention not to apply the 1964 Act to American citizens outside the United States; it also undercuts any argument that Congress is generally reluctant to see its anti-discrimination legislation applied abroad.

2. Before the decision in this case, many authorities had agreed that Title VII applies to discrimination abroad by American employers against American citizens. Every prior district court decision had reached that conclusion. *Seville* v. *Martin Marietta Corp.*, 638 F. Supp. 590 (D. Md. 1986); *Bryant* v. *International Schools Servs., Inc.*, 502 F. Supp. 472 (D.N.J. 1980), rev'd on other grounds, 675 F.2d 562 (3d Cir. 1982); *Love* v. *Pullman Co.*, 13 Fair Empl. Prac. Cas. (BNA) 423, 426 n.4 (D. Colo. 1976), aff'd on other grounds, 569 F.2d 1074 (10th Cir. 1978). See also *Lavrov* v. *NCR Corp.*, 600 F. Supp. 923, 931-932 & n.5 (S.D. Ohio 1984). In these cases, the courts found that the alien exemption was a strong indication of Congress's intention to protect American citizens from discrimination abroad. See, *e.g.*, *Love* v. *Pullman Co.*, 13 Fair Empl. Prac. Cas. (BNA) at 426 n.4 ("Since Congress explicitly excluded aliens employed outside of any state, it must have intended to provide relief to American citizens employed outside of any state * * *.").

In addition, the EEOC, the agency charged with administration of Title VII, has for at least 15 years interpreted the statute to apply to discrimination by American employers against American citizens outside the United States. In 1975, in a letter to a member of the Senate Foreign Relations Committee, the EEOC's General Counsel stated that "[t]he language of Title VII indicates a Congressional intent to make the Title applicable to American citizens employed by American companies operating overseas."[11] As has been noted (note 10, *supra*), the Commission's Chairman reiterated that construction in 1984, when Congress considered whether the ADEA should be

[11] Addendum 1 to EEOC C.A. En Banc Br.

amended to prohibit age discrimination to the same extent. The Commission adhered to that interpretation in a decision on a charge of discrimination occurring abroad, Decision No. 85-16, Empl. Prac. Dec. (CCH) ¶ 6856 (1985), and recently issued a general policy statement setting forth the circumstances under which it will apply Title VII to charges of discrimination overseas, Policy Statement No. N-915.033, EEOC Compl. Man. (CCH) ¶ 2164 (1988).

Finally, the Justice Department has also construed Title VII to apply to discrimination abroad. In 1975, then-Assistant Attorney General Scalia testified before committees of both Houses of Congress that the alien exemption implies that Title VII applies outside the United States. He stated:

> It should be noted that both Executive Order 11478 and § 717 of Title VII specify that they are not applicable to "aliens employed outside the limits of the United States." The implication of this is that they do apply to United States citizens employed throughout the world.
>
> With respect to discrimination in employment by private companies and individuals, Title VII of the 1964 Civil Rights Act, as amended, prohibits a broad range of "unlawful employment practices" by any private employer "engaged in an industry affecting commerce who has fifteen or more employees." * * * Once again the statue [*sic*] contains an exemption "with respect to the employment of aliens outside any State," which implies that it is applicable to the employment of United States citizens by covered employers anywhere in the world.[12]

[12] *Foreign Investment and Arab Boycott Legislation: Hearings Before the Subcomm. on International Finance of the Senate Comm. on Banking, Housing and Urban Affairs*, 94th

In keeping with this testimony, Section 717 of Title VII, 42 U.S.C. 2000e-16, which governs the employment practices of federal agencies, has been applied to alleged discrimination outside the United States. See, *e.g.*, *Brown* v. *Marsh*, 777 F.2d 8 (D.C. Cir. 1985) (Title VII action by civilian employed at a military base in Germany).

Unless further review is granted, the court of appeals' decision will foster confusion in this area of the law.

3. Title VII implements a national goal of the "highest priority." *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 47 (1974). Necessarily, therefore, the question whether the Nation's policy against discrimination is to apply to Americans working abroad is an issue of great importance. The precise number of Americans working abroad for American employers at any one time is difficult to gauge, but there are indications that the figure is a large one. The State Department has estimated that in 1988 there were almost 2.2 million American citizens residing abroad.[13] Although this figure includes dependents, persons who are unemployed or retired, and employees of non-U.S. firms, the number of Americans employed by American firms overseas is substantial.

Cong., 1st Sess. 165 (1975). Accord *Discriminatory Arab Pressure on U.S. Business: Hearings Before the Subcomm. on International Trade and Commerce of the House Comm. on International Relations*, 94th Cong., 1st Sess. 87-88 (1975); *Discriminatory Overseas Assignment Policies of Federal Agencies: Hearings Before a Subcomm. of the House Comm. on Government Operations*, 94th Cong., 1st & 2d Sess. 87-89 (1975-1976).

[13] See *The World Almanac and Book of Facts: 1990*, at 555 (1989). This figure excludes servicemen and federal employees and their dependents.

The class of individuals potentially affected by the question presented in this case is greater than the number employed abroad at any point in time. In many multinational corporations based in this country, assignments in foreign offices are important means through which employees can enrich their experience or enhance their opportunities for advancement. Under the court of appeals' interpretation of Title VII, those employees who seek to take advantage of those opportunities at some point in their careers would be required to relinquish protection from invidious employment discrimination.

The fact that many careers in American firms encompass employment both inside and outside the United States forecloses any sharp division between discrimination in this country and abroad. In those enterprises in which successful performance in overseas assignments is essential or desirable for promotion, the effects of discrimination abroad will be reflected in employment decisions and career paths in this country. In this light, it is not surprising that Congress chose, as the alien exemption reflects, to extend Title VII's protection to Americans whose careers with American firms take them abroad.

The issue of Title VII's extraterritorial application is recurrent as well as important. As of January 23, 1989, the Commission was investigating 50 charges that allege violations of Title VII arising out of employment actions or practices that took place or were implemented overseas. Twenty-eight of these charges are pending in the EEOC's Houston district office, within the Fifth Circuit.

The question presented by this case—whether Title VII's guarantee of equal employment opportunity is to be withdrawn from Americans whose

careers take them abroad to work for American employers—is an issue of widespread importance and should be resolved by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

JOHN R. DUNNE
Assistant Attorney General

JOHN G. ROBERTS, JR.
Deputy Solicitor General

STEPHEN L. NIGHTINGALE
Assistant to the Solicitor General

CHARLES A. SHANOR
General Counsel

GWENDOLYN YOUNG REAMS
Associate General Counsel

VINCENT J. BLACKWOOD
Assistant General Counsel

SAMUEL A. MARCOSSON
Attorney
Equal Employment Opportunity Commission

MAY 1990

APPENDIX A

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 87-2206

ALI BOURESLAN, PLAINTIFF-APPELLANT,

v.

ARAMCO, ARABIAN AMERICAN OIL CO.
and ARAMCO SERVICE COMPANY,
DEFENDANTS-APPELLEES.

Appeal from the United States District Court
for the Southern District of Texas.

Feb. 2, 1990

Before CLARK, Chief Judge, GEE, REAVLEY, POLITZ, KING, JOHNSON, WILLIAMS, GARWOOD, JOLLY, HIGGINBOTHAM, DAVIS, JONES, SMITH and DUHE, Circuit Judges.

W. EUGENE DAVIS, Circuit Judge:

We sit en banc in this case to consider a single question: whether Title VII regulates the employment practices of U.S. employers which employ U.S. citizens outside the United States. We affirm the district court's order dismissing this suit.

I.

In his Title VII suit, Boureslan charged that while he was working in Saudi Arabia his employer, Arab-

ian American Oil Co. (Aramco), discriminated against him because of his race, religion and national origin. Aramco's motion to dismiss for lack of jurisdiction squarely raised the question whether Title VII's protection extends to U.S. citizens employed abroad by U.S. employers.

We answer this question in the negative as did the district court and the panel majority. *See Boureslan v. Aramco*, 857 F.2d 1014 (5th Cir.1988). In reaching this conclusion we adopt the reasoning of the panel majority. We write briefly to summarize the reasons for our conclusion and to include two points that were more fully developed during en banc briefing and argument.

II.

A.

The respect for the right of nations to regulate conduct within their own borders is a fundamental concept of sovereignty that is not lightly tossed aside. *See American Banana Co. v. United Fruit Co.*, 213 U.S. 347, 356, 29 S.Ct. 511, 512, 53 L.Ed. 826 (1909); *Blackmer v. United States*, 284 U.S. 421, 437, 52 S.Ct. 252, 254, 76 L.Ed. 375 (1932). From this concept the established presumption against extraterritorial application of a statute developed. *Id.* The critical question that governs this appeal is whether Congress included language in Title VII that reflects a clear congressional intent to overcome the presumption against extraterritorial application of the Act.

The Supreme Court described this presumption in *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 285, 69 S.Ct. 575, 577, 93 L.Ed. 680 (1949), a case closely analogous to the case at hand. In that case, Filardo, a U.S. citizen, argued that the Federal Eight Hour Law entitled him to overtime pay for work he had

performed while in the employ of Foley Brothers, a U.S. government contractor operating in Iran and Iraq. The Court, in rejecting Filardo's claim, explained the nature of the presumption against extraterritorial application of a statute:

> The canon of construction which teaches that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States . . . is a valid approach whereby unexpressed congressional intent may be ascertained. It is based on the assumption that Congress is primarily concerned with domestic conditions. We find nothing in the Act itself . . . nor in the legislative history, which would lead to the belief that Congress entertained any intention other than the normal one in this case.

Id. The Court's scrutiny of the Eight Hour Law's statutory language and structure revealed no congressional intent to cover workers such as Filardo—a conclusion bolstered by the legislative history's focus on domestic wage and unemployment problems. *Id.* at 285-87, 69 S.Ct. at 577-78. In examining this statute, the Supreme Court set out the standard by which we must measure Boureslan's arguments: "An intention so to regulate labor conditions which are the primary concern of a foreign country should not be attributed to Congress in the absence of a *clearly expressed purpose.*" *Id.* at 286, 69 S.Ct. at 578 (emphasis added).

B.

Boureslan's argument that Title VII reflects a clear congressional intent to extend its reach outside this

country chiefly rests on Title VII's alien exemption provision, 42 U.S.C. § 2000e-1. This provision which expressly establishes an exemption from coverage under the Act provides: "This title shall not apply to an employer with respect to employment of aliens outside of any state." Bourselan finds the necessary clear expression of congressional intent to apply Title VII abroad by drawing a negative inference from that provision and concluding that Congress meant to *include* citizens working abroad when it excluded aliens abroad. We disagree, and for the reasons that follow conclude that this single negative inference falls short of the required clear expression of congressional intent necessary to extend the reach of the Act outside this country.

1.

Boureslan argues first that if we do not attach his negative inference to the alien exemption provision, we strip the provision of all purpose. This is simply not accurate. As we noted in the panel opinion, "no one disputes that the provision excludes coverage to aliens employed outside the states." *Boureslan*, 857 F.2d at 1018. Also the Supreme Court in *Espinoza v. Farrah Mfg. Co.*, 414 U.S. 86, 95, 94 S.Ct. 334, 340, 38 L.Ed.2d 287 (1973), determined that this provision reflects a congressional intent to provide Title VII coverage to aliens employed *within* the United States. Thus, we remain persuaded that we need not choose to either attach Boureslan's negative inference to this provision or strip the provision of all meaning. Even if we decline to give the alien exemption provision the interpretation appellant seeks, the provision is still a meaningful and useful part of the Act.

2.

The domestic focus of the Act is also inconsistent with an intent to give extraterritorial reach to it. As noted in the panel opinion, Boureslan's effort to read an international reach into Title VII's general policy statements and alien exemption provision fails in light of repeated references in the Civil Rights Act of 1964 to "United States", "states" and "state proceedings." *See Boureslan*, 857 F.2d at 1019.

In Title VII itself, Congress specifically accommodated state employment discrimination proceedings in an effort to avoid conflicts with state law and recognized state interests. *See* 42 U.S.C. §§ 2000e-5(c), (d), (e). If Congress had intended the Act to apply in foreign countries, we would expect Congress to have been even more careful to address conflicts with foreign discrimination laws. Yet the statute says nothing about potential conflicts with foreign discrimination laws.

3.

The Act is also curiously silent in a number of areas where Congress ordinarily speaks if it wants to extend its legislation beyond our borders. First, the Act fails to address venue problems that arise with foreign violations. *Cf.* 42 U.S.C. § 2000e-5(f)(3) (establishing venue "in any judicial district in the State in which the unlawful employment practice is alleged to have been committed. . . ."). Next, the Equal Employment Opportunity Council's investigatory powers are limited to evidence obtained in the United States and its territories. 42 U.S.C. § 2000e-9.

Finally, if we give extraterritorial reach to Title VII, the plain language of the Act would necessarily

extend that title to govern the employment relationship between foreign employers, and their American employees anywhere in the world. See § 2000e(b). We say this because nothing in the Act exempts foreign employers and our courts have held that foreign employers engaged in commerce in the United States are employers under Title VII. *See, e.g., Spiess v. C. Itoh & Co. (America), Inc.*, 643 F.2d 353 (5th Cir.1981). We doubt that Congress ever intended to impose Title VII on a foreign employer who had the grace to employ an American citizen in its own country.

4.

As the Court stated as recently as January 1989, when it desires to do so, Congress knows how to give extraterritorial effect to one of its statutes. *Argentine Republic v. Amerada Hess Shipping Co.*, —— U.S. ——, 109 S.Ct. 683, 691, 102 L.Ed.2d 818, 832 (1989). A good example is the Age Discrimination and Employment Act which was amended in 1984 to give the Act extraterritorial application. 29 U.S.C. § 630(f) ("The term 'employee' includes any individual who is a citizen of the United States employed by an employer in a workplace in a foreign country."). *See also* The Comprehensive Anti-Apartheid Act of 1986, 22 U.S.C. §§ 5001-5116 (1979, Supp. 1989); The Export Administration Act, 50 U.S.C. app. §§ 2401-2420 (Supp.1989). Congress demonstrated in the above acts its awareness of the need to make a clear statement of extraterritorial application, address the concerns of conflicting foreign law, and provide the usual nuts-and-bolts provisions for enforcing those rights.

C.

In essence, Boureslan asks this court to conclude that Congress balanced Title VII's important goals against the foreign sovereignty concerns that underlie the presumption against extraterritoriality, considered the implications of application abroad and then addressed these concerns by inviting courts to read between the lines. For the reasons stated above, we cannot accept this conclusion and hold that Title VII does not reflect the necessary clear expression of congressional intent to extend its reach beyond our borders.

AFFIRMED.

KING, Circuit Judge, with whom REAVLEY, POLITZ, JOHNSON and WILLIAMS, Circuit Judges, join dissenting:

I agree with the majority that the sole question presented in this en banc rehearing is whether Congress acted to extend the protections of Title VII to United States citizens employed in other countries by United States employers. I believe that a fair and reasonable reading of this civil rights statute compels the conclusion that Congress did, in fact, intend Title VII's broad remedial goals to encompass, and eradicate, an American employer's discriminatory employment practices against a United States citizen, even if the acts constituting such discrimination were carried out on foreign soil. Therefore, I must respectfully dissent from the majority's holding, which has affirmed the district court's dismissal of appellant Boureslan's action.

The Alien Exemption Clause

It is undisputed that Congress has the power to extend the protection of its laws extraterritorially

when it is regulating the conduct of United States nationals. *See, e.g., Steele v. Bulova Watch Co.*, 344 U.S. 280, 282-83, 73 S.Ct. 252, 253, 97 L.Ed. 319 (1952); *United States v. Mitchell*, 553 F.2d 996, 1001 (5th Cir.1977). In determining whether Congress intended to exercise this power when it enacted Title VII, we are guided by a presumption that acts of Congress are intended to apply only within the territory of the United States unless there is a clear expression of congressional intent to the contrary. *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 285, 69 S.Ct. 575, 577, 93 L.Ed. 680 (1949); *Mitchell*, 553 F.2d at 1002.[1]

A clear expression of Congress's intent regarding the extraterritorial reach of Title VII is found in

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[1] There is a second, and distinct, presumption that Congress does not intend to violate international law. A statute may not be construed to violate international law unless Congress has, by an "affirmative expression" of its intent, required such a construction. *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 21-22, 83 S.Ct. 671, 677, 9 L.Ed.2d 547 (1963); *Weinberger v. Rossi*, 456 U.S. 25, 32, 102 S.Ct. 1510, 1516, 71 L.Ed.2d 715 (1982). As I explained in considerable detail in my panel dissent, extraterritorial application of Title VII under the circumstances before us would not violate international law; therefore, this presumption does not apply in the instant case. *See Boureslan*, 857 F.2d at 1021-31 (King, J., dissenting).

The less stringent standard of the presumption against extraterritorial application of a federal statute does not require an explicit, affirmative statement of Congress. Instead, the Supreme Court has said that the presumption "is a valid means whereby *unexpressed* congressional intent may be ascertained." *Foley Bros.*, 336 U.S. at 285, 69 S.Ct. at 577 (emphasis added). The question involved in our determination is what showing of congressional intent is sufficiently clear to overcome the presumption against extraterritorial application.

section 702 of the statute, the alien exemption clause. 42 U.S.C. § 2000e-1. This section provides that Title VII "shall not apply to an employer with respect to the employment of aliens outside any State." *Id.* If Congress had not envisioned an extraterritorial application of Title VII, a specific provision exempting only aliens from such coverage would not have been needed. Likewise, if Congress had intended in section 702 to explicitly reject extraterritorial application, it would have used one of the statute's general terms: "individuals" or "employees." *See, e.g.*, 42 U.S.C. § 2000e-2 (prohibiting discrimination against "any individual" with respect to his or her employment). *Compare* Fair Labor Standards Act, 29 U.S.C. § 213(f) (excluding from FLSA coverage "any employee" whose services are performed in a foreign country). Canons of statutory construction require that we interpret a statute "to give effect, if possible, to every word Congress used." *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339, 99 S.Ct. 2326, 2331, 60 L.Ed.2d 931 (1979); *see also Argentine Republic v. Amerada Hess Shipping Corp.*, — U.S. ——, 109 S.Ct. 683, 691, 102 L.Ed.2d 818 (1989) (refusing to construe statute to render its terms nugatory); *Beisler v. Commissioner*, 814 F.2d 1304, 1307 (9th Cir.1987) ("We should avoid an interpretation of the statute that renders any part of it superfluous and does not give effect to all of the words used by Congress."). The logical and necessary interpretation of section 702 is that, by specifically providing an exemption for employers regarding the extraterritorial employment of "aliens," without providing a similar exemption as to the corresponding category of "citizens," Congress intended that American employees would be covered under Title VII.

In response to this common-sense interpretation of section 702, the majority relies on two alternative interpretations. First, the majority suggests that the alien exemption provision means simply that aliens employed outside the United States are not covered by Title VII. I do not contend, of course, that section 702 does not mean what it says. However, such a narrow reading of Congress's language, although superficially appealing, is unreasonable because it renders the provision purposeless: if no individual was intended to be covered extraterritorially by Title VII, a specific provision excluding only aliens would be superfluous.

Next, the majority points to a parallel inference that one may draw from section 702: that aliens employed *within* the United States *are* covered by the Act. While this inference also follows logically from the language of the statute, it is in itself redundant because use of the term "individual" in defining "employee" is sufficient to bring aliens residing in the United States within the statute's coverage. 42 U.S.C. § 2000e(f). *See Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 95, 94 S.Ct. 334, 38 L.Ed.2d 287 (1973). Indeed, Congress could not have provided otherwise without violating the equal protection principles implicit in the fifth amendment. *See Yick Wo v. Hopkins*, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220 (1886); *Bolling v. Sharpe*, 347 U.S. 497, 74 S.Ct. 693, 98 L.Ed 884 (1954). Moreover, if Congress's sole purpose in the alien exemption clause was to *provide* coverage to aliens residing in the United States, the more logical location in the statute to express this intent would have been the definition section, where Congress defined "employee," *see* 42 U.S.C. § 2000e(f), not the provision entitled "Exemption," where Congress provided for the limited exceptions to the broad remedial goals of Title VII.[2]

The majority opinion cites *Espinoza* apparently for the proposition that a negative inference that aliens within the United States are covered under Title VII is the "correct" interpretation of Congress's intent in enacting section 702. The plaintiff in *Espinoza* was a Mexican citizen residing in the United States. Explaining that Title VII protects resident aliens against illegal discrimination, the Supreme Court noted that congressional intent on this matter could be derived through a negative inference from section 702. *Espinoza*, 414 U.S. at 95, 94 S.Ct. at 340. Not faced with the question of extraterritorial application, the Court had no need to discuss the mirror inference that is reflected in section 702, although the Court's rationale regarding statutory interpretation supports the derivation of such a legitimate inference. Moreover, the Court pointed out that Congress's intent in Title VII to include aliens could also be derived from its use of the term "any individual" in section 703, *id.*, supporting my point that section 702 would be redundant if the *Espinoza* inference were the only reason for its existence. Thus, the inference that the Supreme Court drew from section 702 in *Espinoza* does not preclude, but rather supports, the equally permissible—and, in fact, more reasonable—infer-

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[2] As a matter of statutory construction, *every part* of the statute is to be considered, including subheadings that Congress has placed on the various sections, to arrive at the statute's clear and total meaning. *House v. Commissioner*, 453 F.2d 982, 987 (5th Cir.1972); *see also Hardin v. City Title & Escrow Co.*, 797 F.2d 1037, 1039 (D.C.Cir.1986) (a descriptive subtitle that was part of an act as written by Congress constitutes an indication of congressional intent) (unanimous opinion of Judges MacKinnon, Bork, and Scalia).

ence that Congress intended Title VII to protect United States citizens employed outside the United States.

Although the legislative history of section 702 is not remarkably illuminating, I have found nothing in the published records that contradicts my interpretation of the provision's extraterritorial language. Rather, it seems clear that section 702 is a "limited exemption" for employers and that "the intent of the [alien] exemption is *to remove conflicts of law which might otherwise exist* between the United States and a foreign nation in the employment of aliens outside the United States by an American enterprise." *Civil Rights: Hearings on H.R. 7152 Before the House Committee on the Judiciary*, 88th Cong., 1st Sess. 2303 (1963) (testimony of Representative Roosevelt explaining provisions of H.R. 405, which was incorporated into Title VII of H.R. 7152) (emphasis added).[3] If Title VII was not intended to apply ex-

[3] The context of this legislative history is explained in my panel dissent, 857 F.2d at 1032 n.26. Arguing that we may not "substitute legislative history for the language of the Act," the panel majority dismissed this "snippet" of legislative history as insignificant. *Id.* at 1018, 1020. Contrary to the majority's characterization of my position, I am not attempting to rely on legislative history to compensate for a lack of statutory language. As explained in this dissenting opinion, I believe the only reasonable interpretation of the plain language of section 702 is that Congress intended an extraterritorial scope for Title VII as between United States citizens and United States employers who are otherwise covered under the Act. In other words, an "exemption" must necessarily be an exemption *from* coverage that all individuals covered under section 703 would otherwise enjoy. The legislative history in this case simply serves to establish that Congress did not mistakenly or clumsily include language in the statute that is superfluous or nonsensical.

traterritorially, Congress would not have been concerned with conflicts of law "which might otherwise exist."[4]

Section 702 obviously reflects Congress's concern that the extraterritorial coverage of aliens under Title VII would infringe the sovereignty of other nations,

[4] The administrative interpretation of Title VII also supports its extraterritorial application. Intervenor-appellant, the Equal Employment Opportunity Commission ("EEOC"), the administrative agency charged by Congress with the responsibility for interpreting and enforcing Title VII, has adopted the position that Title VII applies to American citizens employed by United States firms outside the United States. *See, e.g.*, EEOC Dec. No. 85-16, 2 Empl.Prac.Guide (CCH) ¶ 6857, at 7070-75 (Sept. 16, 1985); Letter from William A. Carey, EEOC General Counsel, to Sen. Frank Church (Mar. 14, 1975), *reprinted in* Note, *Civil Rights, Employment and the Multinational Corporations*, 10 Cornell Int'l L.J. 87, 102-03 (1976) ("If Section 702 is to have any meaning at all, . . . it is necessary to construe it as expressing a Congressional intent to extend the coverage of Title VII to include employment conditions of citizens in overseas operations of domestic corporations at the same time it excludes aliens of the domestic corporation from the operation of the statute.").

Likewise, the Department of Justice has taken the position that the statute applies extraterritorially. In 1975 during legislative debates over a proposed prohibition on participation in foreign boycotts requiring religion-based employment discrimination, then-Assistant Attorney General Antonin Scalia testified that Title VII already applied to the employment of United States citizens by covered employers anywhere in the world. *See Discretionary Arab Pressure on U.S. Business: Hearings Before the Subcomm. on International Trade and Commerce of the House Comm. on International Relations*, 94th Cong., 1st Sess. 88 (1975) (statement of Antonin Scalia, Assistant Attorney General), *quoted in* Note, *Equal Employment Opportunity for Americans Abroad*, 62 N.Y.U.L.Rev. 1288, 1291 (1987).

in that the United States would be imposing its laws on foreign nationals working outside the United States. The effect on foreign jurisdictional sovereignty is far less pronounced, and in some cases could be negligible, when extraterritorial application of Title VII is limited to cases involving United States citizens employed by "American enterprises." This relationship reflects an area where concerns for international sovereignty, comity, and conflicts of law—concerns that explain the alien exemption provision—are outweighed by Congress's commitment in Title VII to protect the personal right of all individuals to equal employment opportunities.[5] *See Bourselan*, 857 F.2d at 1028-30 (King., J., dissenting).

An interpretation of section 702 that extends coverage of Title VII to citizens employed by United States employers in other countries, while denying such coverage to aliens, is supported by the Supreme Court's statutory analysis in *Foley Bros.*, where the Court interpreted another federal statute, the Eight Hour Law, to provide only domestic coverage. 336 U.S. at 285, 69 S.Ct. at 577. The majority cites *Foley Bros.* as a "closely analogous" case to illustrate the presumption against extraterritorial application of a federal statute.[6] A more careful analysis of *Foley*

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[5] Congress explained that Title VII was necessary:

> to remove obstructions to the free flow of interstate and foreign commerce and to insure the complete and full enjoyment by all persons of the rights, privileges, and immunities secured and protected by the Constitution.

House Report on Civil Rights Act of 1964, H.R. Rep. No. 914, 88th Cong., 1st Sess., *reprinted in* 1964 U.S.Code Cong. & Ad.News 2391, 2402.

[6] I disagree that a statute such as the Eight Hour Law is "closely analogous" to Title VII. Labor laws regulating economic conditions of employment or labor-management relations involve different legislative policies—more distinctly domestic policies—and create greater risks of insulting the sovereignty of a foreign nation than does a civil rights statute such as Title VII, which reflects the more universal concerns for individual rights and liberties. *See generally* Note, *Title VII of the Civil Rights Act of 1964 and the Multinational Enterprise*, 73 Geo. L.J. 1465, 1480-83 (1985); *see also* Dehner, *Multinational Enterprise and Racial Non-Discrimination: U.S. Enforcement of an International Human Right*, 15 Harv.Int'l L.J. 71, 91-94, 100 (1974).

Bros. indicates, however, that the Court found in that case that the Eight Hour Law, as opposed to Title VII, contained no language that gave any indication of a congressional purpose to extend the law's coverage extraterritorially. The Court relied heavily on the fact that the statute drew no distinction between citizens and aliens. An extraterritorial application, therefore, would necessarily involve foreign national laborers, thereby creating a risk that the United States would intrude upon an area of "local concern" to foreign nations.[7] The Court explained:

> No distinction is drawn between laborers who are aliens and those who are citizens of the United

[7] The majority quotes the following language from *Foley Bros.*: "An intention so to regulate labor conditions which are the primary concern of a foreign country should not be attributed to Congress in the absence of a clearly expressed purpose." 336 U.S. at 286, 69 S.Ct. at 578. In this quoted passage, the labor conditions of "primary concern" to foreign nations refers to the employment of *aliens* by United States enterprises abroad—the very concern eliminated by the alien exemption provision in Title VII. The Supreme Court does not imply in *Foley Bros.*—and it is disingenuous of the majority to suggest—that the labor conditions of United States citizens employed abroad by United States corporations are "the primary concern of a foreign country."

> States. Unless we were to read such a distinction into the statute we should be forced to conclude, under respondent's reasoning, that Congress intended to regulate the working hours of a citizen of Iran who chanced to be employed on a public work of the United States in that foreign land. . . . The absence of any distinction between citizen and alien labor indicates to us that the statute was intended to apply only to those places where the labor conditions of both citizen and alien employees are a probable concern of Congress. Such places do not include foreign countries such as Iraq and Iran.

Id. at 286, 69 S.Ct. at 578.

By explicitly exempting aliens employed abroad from the scope of Title VII, Congress addressed the factor that the Supreme Court had identified as most likely to violate principles of foreign sovereignty in the extraterritorial application of United States labor laws. I find it compelling that Title VII's alien exemption provision is derived from a fair employment bill that first appeared in April of 1949, H.R. 4453, 81st Cong., 1st Sess., only a few weeks after the Supreme Court's decision in *Foley Bros.*, and that the purpose ascribed to the exemption by the House Committee on Education and Labor some 14 years later tracks the rationale of the *Foley Bros.* decision. *Civil Rights: Hearings on H.R. 7152 Before the House Committee on the Judiciary*, 88th Cong., 1st Sess. 2303 (1963).

Appellee Aramco's broad assertion that no other United States labor law has been construed to apply abroad ignores the fact that no other labor law has contained a specific provision that addressed the concern raised in *Foley Bros.* Only Title VII provides

an exemption from extraterritorial application based on nationality. Moreover, in light of the 1984 amendment to the Age Discrimination in Employment Act,[8] 29 U.S.C. § 621 *et seq.*, ("ADEA"), it cannot be maintained that Congress has consistently declined to protect the rights of American workers employed abroad, or that such protection does not comport with federal policies.

Title VII "Nuts and Bolts"

Although failing to point to any statutory provisions that would preclude extraterritorial application of Title VII, the majority argues that the "focus" and the "nuts and bolts" provisions of the Act are "inconsistent" with a congressional intent to provide extraterritorial coverage to United States citizens. Looking first to the domestic focus of Title VII, I agree with the majority that the Act and its legislative history make several references to problems of employment discrimination within the United States and to state laws governing employment practices. Such references are not inconsistent with the exercise of extraterritorial jurisdiction based on nationality. The impetus for Congress to enact Title VII, as is true for most federal legislation, was to remedy a perceived domestic problem. Congress's intent to apply the statute extraterritorially is a separate issue, and is clearly evidenced in the alien exemption provision. In addition, as I noted in my panel dissent, the effects of employment discrimination suffered by United States citizens while employed in other coun-

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[8] *See* 29 U.S.C. § 630(f) ("The term 'employee' includes any individual who is a citizen of the United States employed by an employer in a workplace in a foreign country.").

tries by United States employers are sufficiently pervasive to be felt in this country. *Boureslan*, 857 F.2d at 1027. I also noted that Congress was not concerned solely with the domestic effects of discrimination, but also with the image of the United States in the international community. *Id.* at 1027-28.

The geographic references in Title VII that relate to the Commerce Clause apply to limit the scope of the term "employer" to those engaged in an industry affecting commerce as that term is defined in the statute. *See* 42 U.S.C. § 2000e. However, this traditional Commerce Clause language does not by itself evidence an intent to restrict the geographic scope of the statute, but rather serves as a "nexus" requirement, providing a basis for Congress's exercise of power under the Commerce Clause. When Congress amended the ADEA in 1984 to provide explicitly for extraterritorial application, it did not alter the virtually identical Commerce Clause language found in that statute. *See* 29 U.S.C. § 630. Rather, it exempted foreign employers not controlled by United States employers. Thus, Congress clearly does not view the Commerce Clause language as a geographic restriction on the scope of an employment discrimination statute.

The majority also argues that Congress could not have intended Title VII to apply extraterritorially because Congress failed to exempt foreign employers that hire United States citizens. It is true that the amendments to the ADEA addressed this concern [9]

[9] *See* Age Discrimination in Employment Act, 29 U.S.C. § 623(g)(2) ("The prohibitions of this section shall not apply where the employer is a foreign person not controlled by an American employer."). This provision was aparently added on the suggestion of the EEOC. *See Age Discrimination and Overseas Americans, 1983: Hearing Before the Subcomm. on Aging of the Senate Comm. on Labor and Human Resources*, 98th Cong., 1st Sess. 5 (1983).

and that an attempt to apply the statute to foreign corporations employing United States citizens abroad could offend the sovereignty of other nations. The legislative history explaining the alien exemption provision of Title VII refers explicitly, however, to "an American enterprise." It follows that Congress intended Title VII to apply extraterritorially only to American employers. However, even if the Commerce Clause language to which the majority refers, 29 U.S.C. § 2000e(b), is the only limitation on "employers" subject to the statute's extraterritorial application, Congress has elsewhere provided an equal or broader jurisdictional grant in a statute and left to the courts the task of applying Commerce Clause analysis and principles of international law to determine whether there is an adequate basis for the exercise of jurisdiction over the acts of a particular defendant occurring outside the territory of the United States. *See, e.g., American Rice, Inc. v. Arkansas Rice Growers Cooperatives Ass'n*, 701 F.2d 408 (5th Cir.1983) (Lanham Act); *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909 (D.D.Cir.1984) (Sherman Act).[10]

The majority next points to Title VII enforcement provisions relating to state law conflicts, *see* 42 U.S.C.

[10] In most cases, a court would probably find no jurisdiction over a foreign employer's extraterritorial practices, or would decline to exercise jurisdiction, based on the same principles of international law discussed in my panel dissent. *See Boureslan*, 857 F.2d at 1025-31. The only question before this en banc court, however, is whether Title VII's protections apply to a United States citizen employed abroad by an American employer.

§§ 2000e-5(c), (d), (e), arguing that "[i]f Congress had intended the Act to apply in foreign countries, we would expect Congress to have been even more careful to address conflicts with foreign discrimination laws." Looking again to the amended ADEA, which contains a similar federal-state relationship clause, 29 U.S.C. § 633, I note that Congress saw no need to add a provision addressing conflicts with overlapping foreign laws that prohibit discrimination in employment when Congress provided for the ADEA's extraterritorial scope. Congress did, however, amend the ADEA's "BFOQ" provision, specifying that actions otherwise prohibited under the Act shall not be unlawful if compliance with the ADEA's provisions "would cause such employer, or a corporation controlled by such employer, to violate the laws of the country in which such workplace is located." 29 U.S.C. § 623(f)(1). This circuit has already interpreted the BFOQ provision of Title VII in this fashion. *Kern v. Dynalectron Corp.*, 577 F.Supp. 1196 (N.D. Tex. 1983) (assuming without addressing the extraterritorial coverage of Title VII), *aff'd on basis of district court opinion*, 746 F.2d 810 (5th Cir. 1984).[11]

The majority finds it curious that Congress made no special provisions in Title VII either for the venue of cases arising from extraterritorial violations or for the investigatory powers of the Equal Employment

[11] In *Kern*, a United States helicopter company required all its pilots who flew from Jeddah to Mecca, Saudi Arabia, to be Moslem. The defendant company argued that religion was a bona fide occupational qualification because Saudi law prohibited non-Moslems from entering the holy area of Mecca under penalty of death. We affirmed the district court's finding that the employer had not violated Title VII.

Oppportunity Commission ("EEOC") in such cases. First, Title VII provides for venue not only in the district in which the violation was committed, but also in either the district where relevant employment records are administered, or the district where the aggrieved employee would have worked but for the unlawful employment practice. 42 U.S.C. § 2000e-5(f)(3). Venue in one of the latter two districts would usually be available in the situation—certainly not uncommon—involving the temporary foreign assignment of an employee advancing on the corporate track of an American multinational corporation. In addition, Title VII provides that if an employer is not "found" within any of the first three specified districts, venue is proper "in the judicial district in which the respondent has his principal office." *Id.* An American enterprise will generally have a principal office in the United States.[12]

Second, the geographical limitations on the EEOC's investigative powers—in both the original Act and in the 1972 amendments—apply only to the EEOC's power to *compel* compliance with administrative procedures. *See* 42 U.S.C. § 2000e-9 (incorporating 29 U.S.C. § 161, which allows the EEOC to compel the appearance of witnesses and the production of documents from anywhere within the United States or its territories). There is nothing in Title VII that precludes the EEOC from attempting to obtain the employer's voluntary cooperation in investigation and

[12] It is not necessary for purposes of this appeal to delineate the circumstances under which an American parent corporation will exercise sufficient control over its foreign subsidiary so that the enterprise will constitute an American employer.

conciliation efforts.[13] It would be unreasonable [sic*] for Congress to conclude that United States citizens are entitled to the protections of Title VII abroad, but to decline to authorize the EEOC to expend the time or resources necessary to compel compliance with an investigation of a case in which documents and witnesses are located in other countries. Furthermore, American enterprises likely maintain records in their home offices as well as abroad, or exercise sufficient control over their foreign operations to request the production of witnesses and documents through internal channels. Thus, the EEOC clearly has the power to subpoena the home office for evidence necessary to an investigation.

The majority finally cites the ADEA as a good example for the proposition that Congress knows how to give extraterritorial effect to a statute when it desires to do so. What the majority fails to mention is that at the time Congress amended the ADEA, courts had consistently held that the ADEA did not apply extraterritorially. *See e.g., Cleary v. United States Lines, Inc.*, 728 F.2d 607 (3d Cir.1984); *Zahourek v. Arthur Young & Co.*, 567 F.Supp. 1453 (D.Colo.1983), *aff'd*, 750 F.2d 827 (10th Cir.1984). These cases had distinguished the ADEA from Title VII because the ADEA incorporates the geographic

[13] The ADEA, unlike Title VII, incorporates the enforcement provisions of the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.* Under the relevant provision in the ADEA, the EEOC's enforcement powers extend *only* to cooperation with state agencies and voluntary conciliation attempts. *See* 29 U.S.C. § 626. Congress left the EEOC enforcement provisions of the ADEA unchanged when it explicitly provided for extraterritorial application of the ADEA in 1984.

* In the slip opinion, the word used was "reasonable." Based upon the context, we believe "reasonable" was intended.

restrictions of the Fair Labor Standards Act,[14] which Title VII does not, and contains no alien exemption clause such as is found in section 702 of Title VII. *See Cleary*, 728 F.2d at 609; *Zahourek*, 567 F.Supp. at 1456; *see also Pfeiffer v. Wm. Wrigley Jr., Co.*, 755 F.2d 554, 559 (7th Cir.1985). Every court previously faced with the issue of Title VII's scope either had concluded that the alien exemption provision evidenced an intent to apply the Act extraterritorially, or had simply assumed jurisdiction without discussion. *See Bryant v. International Schools Serv., Inc.*, 502 F.Supp. 472 (D.N.J.1980), *rev'd on other grounds*, 675 F.2d 652, 577 n. 23 (3d Cir.1982); *Seville v. Martin Marietta Corp.*, 638 F.Supp. 590 (D.Md.1986) (adopting *Bryant's* reasoning); *Love v. Pullman Co.*, 13 Fair Empl.Prac.Cas. (BNA) 423, 426 n. 4 (D.Colo.1976), *aff'd on other grounds*, 569 F.2d 1074 (10th Cir.1978).

In amending the ADEA, Congress also had before it the testimony of the EEOC that Title VII applied abroad. *See Age Discrimination and Overseas Americans, 1983: Hearing Before the Subcomm. on Aging of the Senate Comm. on Labor and Human Resources*, 98th Cong., 1st Sess. 3 (1983). Senator Charles Grassley, Chairman of the Subcommittee on Aging of the Committee on Labor and Human Resources, and sponsor of the bill extending the ADEA to citizens employed abroad, stated when he introduced the ADEA amendment that legislation was necessary to correct the unintended "anomaly" of applying the ADEA only domestically, while Title VII was ap-

[14] Section 626(b) of the ADEA incorporates 29 U.S.C. § 213(f) of the Fair Labor Standards Act, which excludes "any employee whose services during the workweek are performed in a workplace within a foreign country."

plied both home and abroad. 129 Cong.Rec. S17,018 (daily ed. Nov. 18, 1983). Thus, there is every indication that when Congress amended the ADEA in 1984, it intended simply to make the scope of the Act coextensive with that of Title VII.[15] It would otherwise seem anomalous that Congress would desire the elimination of extraterritorial workplace discrimination based only on an employee's age, and not on an employee's race, color, religion, sex, or national origin —categories that have traditionally enjoyed heightened constitutional scrutiny and great legislative concern as impediments to equal opportunities.

International Law

In his panel majority opinion, Judge Davis rejects the evidence of congressional intent to apply Title VII extraterritorially as inadequate, referring to policy considerations—including religious and cultural differences with other nations—that purportedly militate against such an application of the statute. *See Boureslan*, 857 F.2d at 1020. Unless, however, the conflicts of law to which the majority refers rise to the level of a violation of international law, they are not a sufficient basis on which to reject categorically the clear evidence of congressional intent existing in this case.

As I explained in my panel dissent, extraterritorial application of Title VII would not violate international law. *See id.* at 1024-31. I will not here repeat

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[15] See also the report of the Committee on Labor and Human Resources, which describes the amendment of the ADEA to provide for extraterritorial coverage of United States citizens as a "minor change[]" in the Act. S.Rep. No. 98-467, 98th Cong., 2d Sess. 2 (1984), *reprinted in* 1984 U.S.Code Cong. & Ad.News 2974, 2975.

that lengthy discussion. Briefly, applying the test set forth in section 403 of the Restatement (Third) of Foreign Relations Law, it clearly is not unreasonable for the United States to require that American companies comply with Title VII in their employment of United States citizens in other countries: The United States has a strong and legitimate interest in protecting citizens employed abroad by American corporations from discrimination in employment; Title VII is consistent with the norms of the international community, which has adopted numerous accords condemning discrimination, including discrimination in employment; American citizens have a legitimate expectation that they will not lose the protection of Title VII when they accept a position with the foreign office of an American enterprise; and the potential for conflicts with foreign law are minimized by the fact that the statute applies only to United States nationals and by the BFOQ defense that has been interpreted in an opinion endorsed by this court to exempt an employer from liability where a violation of Title VII is compelled by foreign law. *See Kern*, 577 F.Supp. at 1201.

This is not to say that the exercise of extraterritorial jurisdiction under Title VII would be appropriate in every case. However, the fact that we can hypothesize situations in which a conflict would arise does not mean that the statute must be construed so that it *never* applies abroad. "Because Congress . . . can neither anticipate nor resolve all conflicts with foreign jurisdiction," it necessarily relies upon the judiciary to minimize conflicts of jurisdiction by exercising a jurisdictional rule of reason in individual cases. *Laker Airways*, 731 F.2d at 952 n. 169. The Restatement does not purport to eliminate concur-

rent jurisdiction. Rather, it recognizes that two or more states may exercise jurisdiction over the same activities or individuals when the exercise of jurisdiction by each state is reasonable. The Restatement provides mechanisms for courts to moderate the exercise of jurisdiction when conflicts do arise. This is a process that most courts of appeals, including this one, have employed in other cases involving extraterritorial application of United States law. *See, e.g., American Rice*, 701 F.2d at 414.

The concern voiced by the majority—that extraterritorial application of Title VII will create conflicts of law—is, thus, adequately addressed by the provisions of the statute itself and by the same principles of international law that have traditionally allowed United States courts to moderate their exercise of extraterritorial jurisdiction in the case of actual conflicts of law.

Conclusion

In enacting Title VII of the Civil Rights Act of 1964, Congress expressed its determination that all Americans are entitled to be free of the intolerable barrier of discrimination in employment based on race, color, religion, sex or national origin. Under the majority's holding, however, Congress's commitment represents merely an empty promise to the thousands of American women and minorities employed in other countries by American multinational firms. Such individuals face the dilemma of accepting an assignment abroad, often considered to be a lucrative opportunity and, in many such multinational enterprises, a prerequisite for career advancement at home, only at the cost of relinquishing the protections and remedies of Title VII upon crossing the territorial borders of the United States. Employment

discrimination by American employers against American citizens—wherever practiced—has devastating effects both on the economy of this country and on the dignity and livelihoods of Americans who have come to rely over the past quarter of a century on achievements made possible, in part, by civil rights legislation. The salutary goals of Title VII cannot be fully realized if the fortuitous location of an American employee at the overseas office of an American firm could mean the difference between equal opportunity and discrimination at will.

Congress certainly recognized the potential for abuse represented by American multinational concerns when it enacted Title VII, which must explain its inclusion of section 702 of the Act, the alien exemption clause. Balancing the broad remedial goals of this civil rights statute against the potential conflicts that would arise in attempting to regulate the employment of aliens outside the United States, Congress followed the reasoning of the Supreme Court in *Foley Bros.* and drew an extraterritorial line based on nationality.

There is no justification for disregarding the clear evidence of congressional intent to apply Title VII to United States citizens employed in other countries by American enterprises. Congress made the judgment in 1964 in Title VII, just as it did again in 1984 in the ADEA amendments, that American nationals employed by United States employers are entitled to the same protection from employment discrimination abroad as they enjoy at home. If we are not to substitute our policy judgments for those of Congress, we must give effect to Congress's intent to apply Title VII extraterritorially. I respectfully dissent from the majority's refusal to do so.

APPENDIX B

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 87-2206

ALI BOURESLAN, PLAINTIFF-APPELLANT,

v.

ARAMCO, ARABIAN AMERICAN OIL COMPANY and ARAMCO SERVICE COMPANY, DEFENDANTS-APPELLEES.

Oct. 17, 1988

Before KING* and DAVIS, Circuit Judges, and PARKER,** District Judge.

W. EUGENE DAVIS, Circuit Judge:

Plaintiff, a naturalized citizen of the United States, brought an employment discrimination suit—predicated upon Title VII and state law causes of action—against his employer, a United States corporation whose principal place of business is in Saudi Arabia. In his suit, plaintiff charged that while he was working in Saudi Arabia, his employer discriminated against him on the basis of his race, religion, and national origin. The employer contested plaintiff's claims of discrimination and, in addition, moved the

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* Formerly Judge Randall.

** District Judge of the Eastern District of Texas, sitting by designation.

district court to dismiss the entire action. The employer argued that the reach of Title VII does not extend to United States citizens employed abroad by United States employers and, therefore, that the district court lacked subject matter jurisdiction over plaintiff's claim. The district court agreed, granted the employer's motion, and dismissed plaintiff's suit. On appeal, plaintiff—joined by the Equal Employment Opportunity Commission as *amicus curiae*—urges us to conclude, that Congress intended Title VII to apply extraterritorially to protect United States citizens employed by United States employers. We find, however, that the rules of statutory construction which control our review of Title VII do not permit the conclusion plaintiff urges—we cannot say that Congress, through either the language of Title VII or its legislative history, clearly expressed its intent that Title VII be applied extraterritorially. Therefore, we conclude that Title VII does not offer plaintiff an available remedy for his claimed discrimination and affirm the district court.

I.

This appeal presents a single issue: Does Title VII regulate the employment practices of businesses which, although incorporated in the United States, employ citizens of the United States in foreign countries? The question reaches us as a result of the employment relationship between Ali Boureslan, Arabian American Oil Company (Aramco), and Aramco Services Company (ASC). In 1979, Boureslan—a naturalized United States citizen who was born in Lebanon—went to work as an engineer for ASC in Houston, Texas. ASC is a Delaware corporation with its principal place of business in Houston;

ASC is a subsidiary of Aramco, licensed to do business in Texas, with its principal place of business in Dhahran, Saudi Arabia. In November 1980, Boureslan requested a transfer to Aramco. Because Aramco explores, produces, and refines oil and gas exclusively within the Kingdom of Saudi Arabia, Boureslan's transfer from ASC to Aramco also meant a transfer from the United States to Saudi Arabia.

Shortly after beginning work in Saudi Arabia, Boureslan began having altercations with his supervisor. According to Bourleslan, the altercations were the result of a "campaign of harassment" which the supervisor initiated—a campaign which took the form of racial, religious, and ethnic slurs and which culminated in Boureslan's termination on June 16, 1984.

After he was fired, Boureslan first filed charges against Aramco with the Equal Employment Opportunity Commission (EEOC) in the United States and, later, instituted this suit against both Aramco and ASC in the United States District Court for the Southern District of Texas. In each case, the focus of Boureslan's attack was the discriminatory treatment which he allegedly received while in Saudi Arabia from his Aramco supervisor. In his lawsuit, Bourleslan sought relief under both Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., and state law. In response to the lawsuit, both Aramco and ASC filed answers denying liability and separately filed motions to dismiss for lack of subject matter jurisdiction. ASC stressed two reasons why Boureslan's claims against ASC should be dismissed. First, ASC argued that, at most, only Aramco could be liable to Boureslan since, according to ASC, Boureslan's transfer from ASC to Aramco terminated the employment relationship between ASC and

Boureslan. Second, ASC argued that Boureslan failed properly to exhaust his administrative remedies under Title VII with respect to ASC because Boureslan named only Aramco in the one grievance he filed with the EEOC.

While ASC's grounds for dismissal challenged only the propriety of its own inclusion in Boureslan's lawsuit, Aramco's motion to dismiss raised a more sweeping challenge—a challenge which, if true, required a dismissal of the lawsuit against both Aramco and ASC. Aramco argued that the protections of Title VII do not extend extraterritorially and, consequently, that Title VII offers no protection to Boureslan for acts of discrimination which occurred in Saudia Arabia. Boureslan contested this interpretation, and argued that the clear and express terms of Title VII demonstrate Congress' intent to protect United States citizens from employment discrimination by American employers regardless of where the discrimination occurs. In an opinion dated January 27, 1987, the district court considered carefully the question of Title VII's geographic reach. After examining Title VII's language and legislative history, Supreme Court cases on extraterritorial application of federal statutes, and other existing case law on the scope of Title VII, the district court concluded that Title VII does not afford extraterritorial protection. *Boureslan v. Aramco*, 653 F.Supp. 629, 631 (S.D. Tex.1987). Consequently, the court dismissed Boureslan's Title VII action against Aramco and ASC for lack of subject matter jurisdiction; it also dismissed Boureslan's state law claims for lack of pendent jurisdiction, and entered final judgment in favor of both defendants. On appeal, Boureslan asks us to find that Congress intended Title VII to be applied extraterritorially.

II.

A special set of rules of statutory interpretation are in place to assist us in determining whether Congress intended to give a statute application outside this country. We first examine those rules.

In *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 69 S.Ct. 575, 93 L.Ed. 680 (1949), the Supreme Court considered whether a federal statute prohibiting workdays of longer than eight hours without overtime pay applied to a contract between the United States and a private contractor for work performed in a foreign country. *Id.* at 282, 69 S.Ct. at 576. As the Court saw it:

> The canon on construction which teaches that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States, is a valid approach whereby unexpressed congressional intent may be ascertained. It is based on the assumption that Congress is primarily concerned with domestic conditions. We find nothing in the Act itself, as amended, nor in the legislative history, which would lead to the belief that Congress entertained any intention other than the normal one in this case.

Id. at 285, 69 S.Ct. at 577 (citation omitted).

See also McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10, 21-22, 83 S.Ct. 671, 677-78, 9 L.Ed.2d 547 (1963).

This court has consistently applied the presumption against extraterritoriality. In *United States v. Mitchell*, 553 F.2d 996 (5th Cir.1977), we refused to read extraterritorial application into the Marine Mammal Protection Act. In ruling against extraterritorial application, we noted that "the government [failed] to [show] any clear expression of congressional intent [to overcome the presumption against extraterritorial application]." In *De Yoreo v. Bell Helicopter Textron, Inc.*, 785 F.2d 1282, 1283 (5th Cir.1986), we rejected the argument that the Age Discrimination In Employment Act (ADEA) be given extraterritorial application.

Other circuits have followed the Supreme Court in denying extraterritorial application without a clear congressional expression of intent to the contrary. For example, in *Pfeiffer v. Wm. Wrigley, Jr. Co.*, 755 F.2d 554 (7th Cir.1985), the Seventh Circuit considered the extraterritorial application of the ADEA. After finding that the statute did not speak directly to the issue of extraterritorial application, the court applied the presumption against extraterritorial application, noting that "[t]he fear of outright collisions between domestic and foreign law—collisions both hard on the people caught in the cross-fire and a potential source of friction between the United States and foreign countries—lies behind the presumption against extraterritorial application of federal statutes." *Id.* at 557. Likewise in *Cleary v. United States Lines, Inc.*, 728 F.2d 607 (3d Cir. 1984), the Third Circuit rejected the application of the ADEA extraterritorially without "affirmative evidence of congressional intent." *See also Air Line Stewards and Stewardesses Ass'n Int'l v. Trans World Airlines, Inc.*, 273 F.2d 69, 70 (2d Cir.1959), *cert. denied*, 362 U.S. 988, 80 S.Ct. 1075, 4 L.Ed.2d 1021 (1960) (denying extraterritorial application of the Railway Labor Act (RLA)); *Air Line Stewards and Stewardesses Ass'n Int'l v. Northwest Airlines,*

Inc., 267 F.2d 170, 178 (8th Cir.), *cert. denied*, 361 U.S. 901, 80 S.Ct. 208, 4 L.Ed.2d 156 (1959) (denying extraterritorial application of RLA); *Air Line Dispatchers Ass'n v. National Mediation Bd.*, 189 F.2d 685, 690-91 (D.C.Cir.), *cert. denied*, 342 U.S. 849, 72 S.Ct. 77, 96 L.Ed. 641 (1951) (denying extraterritorial application of RLA); *see generally* Restatement (Second) of the Foreign Relations Law of the United States § 38 (1965).

Against this backdrop, we examine the language and legislative history of Title VII to determine whether Congress intended the act to have extraterritorial application.

III.

A.

Boureslan's discrimination case is based upon § 703(a)(1) of Title VII which provides:

> It shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a)(1).

Extraterritorial application is not directly addressed in Title VII. Section 2000e(b) defines "employer" under the Act as including any "person employed in an industry affecting commerce." The term "commerce" is in turn defined as "trade, traffic, commerce, transportation, transmission, or communication among the several States; or between a State and any place outside thereof." 42 U.S.C. § 2000e(g).

Boureslan, however, relies on § 2000e-1 commonly referred to as the alien exemption provision, which provides that "[t]his title shall not apply to an employer with respect to employment of aliens outside of any state."[1] Boureslan argues that a "negative inference" should be drawn from this language that Congress intended Title VII to cover United States citizens working abroad for United States employers. Boureslan argues that the alien exemption provision has no purpose if Title VII is not applied to protect citizens extraterritorially because in the absence of this provision neither citizens nor aliens would be protected while working outside the country. Boureslan notes that one district court has accepted this argument. *Bryant v. International School Servs.*, 502 F. Supp. 472 (D.N.J.1980), *rev'd on other grounds*, 675 F.2d 562 (3d Cir.1982).

But the alien exemption provision does have a purpose even if we accept the district court's conclusion

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[1] Eight years after the enactment of Title VII, Congress added the following language to extend protection of the Act to federal employees, and included the alien exemption language:

> All personnel actions affecting employees or applicants for employment (*except with regard to aliens employed outside the limits of the United States*) in military departments . . . , in executive agencies . . . , in the United States Postal Service and the Postal Rate Commission, in those units of the government of the District of Columbia having positions in the competitive service, and in those units of the legislative and judicial branches of the Federal Government having positions in the competitive service, and in the Library of Congress shall be made free from any discrimination based on race, color, religion, sex, or national origin. (emphasis added).

42 U.S.C. § 2000e-16(a).

that Title VII does not protect citizens abroad. First, no one disputes that the provision excludes coverage to aliens employed outside the states. Second, in *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 95, 94 S.Ct. 334, 340, 38 L.Ed.2d 287 (1973), the Supreme Court attached another meaning to the provision's domestic scope. The Court concluded that the alien exemption provision reflects a congressional intent to provide Title VII coverage to aliens employed *within* the United States.

Thus, we do not face a choice between attaching appellant's negative inference to the alien exemption provision or stripping the provision of all purpose. If we decline to give the alien exemption provision the interpretation appellant seeks, the provision still is a meaningful and useful part of the Act. Appellant has not persuaded us that the provision's language merits an interpretation against extraterritorial application of the Act.

Boureslan argues next that the legislative history of Title VII, when coupled with the statutory language, evidences a clear congressional intent to apply the Act extraterritorially. It is to the legislative history, therefore, that we must now turn.

B.

Before considering the particular portions of the legislative history pointed to by Boureslan, it is important that we define the role allocated to legislative history in statutory interpretation. Legislative history is relegated to a secondary source behind the language of the statute in determining congressional intent; even in its secondary role legislative history must be used "cautiously." *United States v. Smith*, 795 F.2d 841 (9th Cir.1986). Courts are not free to

substitute legislative history for the language of the Act and legislative history is not an adequate substitute for congressional action. *Piper v. Chris-Craft Indus., Inc.*, 430 U.S. 1, 97 S.Ct. 926, 5 L.Ed.2d 124 (1977); *United States v. Devall*, 704 F.2d 1513 (11th Cir. 1983); *Aronsen v. Crown Zellerbach*, 662 F.2d 584 (9th Cir. 1981), *cert. denied*, 459 U.S. 1200, 113 S.Ct. 1183, 75 L.Ed.2d 431 (1983). The Supreme Court has repeatedly stated that "'[a]bsent a clearly expressed legislative intention to the contrary, [statutory] language must ordinarily be regarded as conclusive.'" *Escondido Mut. Water Co. v. La Jolla Indians*, 466 U.S. 765, 772, 104 S.Ct. 2105, 2110, 80 L.Ed.2d 753 (1984) (quoting *North Dakota v. United States*, 460 U.S. 300, 312, 103 S.Ct. 1095, 1102, 75 L.Ed.2d 77 (1983); *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 100 S.Ct. 2051, 64 L.Ed.2d 766 (1980).

The EEOC in its amicus curiae brief points to three statements in the legislative history that, it argues, supports its interpretation of the Act. First, the EEOC notes that in the House report that accompanied the Act to the Senate floor, the passage of Title VII was declared necessary:

> [t]o remove obstructions to the free flow of interstate commerce and to insure the complete and full enjoyment by all persons of the rights, privileges, and immunities secured and protected by the Constitution.

House Report on Civil Rights Act of 1964, H.R.Rep. No. 914, 88th Cong., 1st Sess. (1963), reported in 1964 U.S.Cong. Code & Admin.News 2391, 2402. Second, EEOC stresses a comment by Representative William McCulloch, ranking minority member of the House Judiciary Committee, in which McCulloch

stated that "[a] key purpose of the bill, then, is to secure to all Americans the equal protection of the laws of the United States and of the several states." *Id.*, reprinted in 1964 U.S.Cong. Code & Admin.News at 2488. EEOC also points out that the minority report states that "[t]he rights of citizenship mean little if an individual is unable to gain the economic wherewithall to enjoy or properly use them." *Id.* at 2516. The EEOC argues that these general policy statements reflect a strong intent by Congress to combat employment discrimination on all fronts without any geographic limits. Thus, the EEOC asserts that the omission of any mention of extraterritorial applicaton supports, rather than detracts, from their position.[2]

These references to Title VII's legislative history fall far short of the clear expression of congressional intent required to overcome the presumption against extraterritorial application. The statements, carefully taken from a voluminous legislative history, are no more specific than the statutory language itself. To rely on such general policy statements would effectively adopt a presumption in favor of extraterritorial application. This is particularly true when the legis-

[2] In *Espinoza*, 414 U.S. at 94, 94 S.Ct. at 339, the Court noted that the EEOC's interpretation of Title VII is generally entitled to deference. However, such interpretations are not controlling on the courts. Because this is a jurisdictional issue with little or no statutory language or legislative history, and one in which the EEOC has developed no particular expertise, we give the EEOC's interpretation less deference than usual. This is particularly appropriate given the traditional presumption against extraterritoriality. *See General Electric Co. v. Gilbert*, 429 U.S. 125, 141-42, 97 S.Ct. 401, 410-11, 50 L.Ed.2d 343 (1976); *Skidmore v. Swift & Co.*, 323 U.S. 134, 140, 65 S.Ct. 161, 164, 89 I.Ed. 124 (1944).

lative history contains numerous statements that arguably favor geographic limits for Title VII.

For example, the Act's language and legislative history make repeated references to the "United States," "states," and procedures relating to state proceedings without parallel references to foreign countries. 42 U.S.C. 2000e(i) defines "state" to include the states and other areas under United States jurisdiction, with no reference to foreign countries. References in the legislative history highlight concerns about employment discrimination problems in the states, Senator Hubert Humphrey, 110 Cong. Rec. 6550 (1964); the effect of Title VII on southern states versus other states, Senator Richard Russell, 110 Cong.Rec. 14301 (1964); and deferral to state employment laws, Congressman Emanuel Celler, 110 Cong.Rec. 1521 (1964).

Moreover, Congress deleted reference to "foreign commerce" and "foreign nations" from earlier House versions of Title VII.[3] While these references and deletions are not conclusive legislative support, they are certainly as persuasive as policy statements in the legislative history offered by the EEOC.

EEOC also points to a reference in the alien exemption provision contained in a house report rendered in connection with H.R. 405, a concurrent attempt to fashion equal employment legislation during the 88th Congress' first session in 1963. This report was placed in the record in the hearings for H.R. 7152,

[3] These deletions are reflected in an annotated copy of the House bill that Senator Dirksen inserted into the Congressional Record on June 5, 1964, an anticipation of debate on the Senate's substitute bill. Senator Everett Dirksen, 110 Cong.Rec. 12811-817 (1964).

which ultimately became the Civil Rights Act of 1963. The report stated,

> In section 4 of the Act, limited exception is provided for employers with respect to employment of aliens outside of any state, and also, to any religious corporations, associations, or societies. The intent of the first exemption is to remove conflicts of law which might otherwise exist between the United States and a foreign nation in the employment of aliens outside the United States by an American enterprise.

Civil Rights: Hearings on H.R. 7152, as amended by Subcommittee No. 5 before the House Committee on the Judiciary, 88th Cong., 1st Sess. 2303 (1963). EEOC urges us to interpret this language to reflect an intent that, but for the alien exemption provision, Title VII protects all persons employed overseas by American employers.

However, this brief reference sheds little additional light on the issue. Whether it points to the provision's bare language or to this snippet of legislative history, EEOC still must argue a negative inference. That is, EEOC argues that Congress spoke by not speaking. This silence will not reverse the presumption that this legislation applies only to employees employed in the United States.[4]

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[4] The colloborative [*sic*] nature of the way in which H.R. 405 found its way into H.R. 7152 further dilutes the report's impact. The General Subcommittee on Labor voted on June 20, 1963, to report H.R. 405 to the full Committee on Education and Labor. On July 31, 1963, Subcommittee No. 5 of the House Committee on the Judiciary placed this report in the record of hearings on H.R. 7152, the administration's civil rights bill. Subcommittee No. 5 substituted H.R. 405 for the equal employment title originally proposed in H.R. 7152, and reported H.R. 7152 favorably to the full judiciary committee. The full committee retained the alien exemption provision when it reported the title on Nov. 20, 1963. Ultimately, Congress enacted H.R. 7152 as the Civil Rights Act of 1963. In short, EEOC looks for a clear expression of intention in a negative inference arising from one paragraph of a report rendered by members of a House subcommittee that did not participate in voting the bill out of the Judiciary Committee and sending it to the full House.

Finally, Boureslan and the EEOC advance a number of policy arguments in favor of the extraterritorial application of Title VII. These arguments go to the inequity of denying Americans employed abroad protections to which they are entitled in the United States. Although these arguments have obvious appeal, we cannot ignore strong countervailing policy arguments against the application of Title VII abroad. The religious and social customs practiced in many countries are wholly at odds with those of this country. Requiring American employers to comply with Title VII in such a country could well leave American corporations the difficult choice of either refusing to employ United States citizens in the country or discontinuing business. Given the serious, potentially devisive [*sic*] policy considerations for and against application of the Act outside the country, the paucity of reference to such an application either in the Act itself or the debates in Congress is a compelling argument that Congress did not turn its attention to this possibility. It is not for this court to decide this policy issue for the legislative branch.

> While the judicial function in construing legislation is not a mechanical process from which judgment is excluded, it is nevertheless very different from the legislative function. Construction is not

legislation and must avoid "that retrospective expansion of meaning which properly deserves the stigma of judicial legislation." To blur the distinctive functions of the legislative and the judicial processes is not conductive to responsible legislation.

Addison v. Holly Hill Fruit Prods. Co., 322 U.S. 607, 618, 64 S.Ct. 1215, 1221, 88 L.Ed. 1488 (1944) (citation omitted).

IV.

The presumption against extraterritorial application establishes a high hurdle for appellant's arguments to overcome. Neither the statute's bare language nor the sparce [*sic*] indirect language on the subject in the legislative history persuade us that he has cleared this hurdle.

AFFIRMED.

KING, Circuit Judge, dissenting:

Today, in the first circuit court opinion to consider expressly the extraterritorial application of Title VII,[1] the majority holds that Title VII affords no protection

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[1] Every district court that has considered the question has held that Title VII does apply extraterritorially. *Bryant v. International Schools Services, Inc.*, 502 F.Supp. 472 (D.N.J. 1980), *rev'd on other grounds*, 675 F.2d 562, 577 n. 23 (3d Cir.1982) (declining to reach question of Title VII's extraterritorial application); *Seville v. Martin Marietta Corp.*, 638 F.Supp. 590 (D.Md.1986) (adopting *Bryant's* reasoning); *Love v. Pullman*, 13 Fair Empl.Prac.Cas. (BNA) 423, 426 n. 4 (D.Colo.1976), *aff'd on other grounds*, 569 F.2d 1074 (10th Cir.1978); *see also Kern v. Dynaelectron*, 577 F.Supp. 1196 (N.D.Tex.1983) (applying Title VII extraterritorially without expressly considering threshold jurisdictional issue), *aff'd mem.*, 746 F.2d 810 (5th Cir.1984).

from employment discrimination to U.S. citizens who are employed abroad by U.S. corporations. Because an examination of the language and legislative history of Title VII reveals that Congress did not intend the protections of Title VII to be so restricted, and because the extraterritorial application of Title VII to U.S. nationals would not violate principles of international law, I must respectfully dissent from the majority's holding.

I. The Presumption Against Extraterritoriality

It is undisputed that Congress had the power to extend Title VII's protections extraterritorially. *See Steele v. Bulova Watch Co.*, 344 U.S. 280, 282-83, 73 S.Ct. 252, 253-54, 97 L.Ed. 319 (1952); *Foley Bros. v. Filardo*, 336 U.S. 281, 284, 69 S.Ct. 575, 577, 93 L.Ed. 680 (1949); *United States v. Mitchell*, 553 F.2d 996, 1001 (5th Cir.1977). Nationality is an accepted basis for the exercise of jurisdiction. Thus, a state may prescribe law relating to the conduct of its nationals, even when that conduct occurs outside of the state's territory. *See Steele*, 344 U.S. at 285-86, 73 S.Ct. at 255-56; *Blackmer v. United States*, 284 U.S. 421, 436-37, 52 S.Ct. 252 254-55, 76 L.Ed. 375 (1932); *Mitchell*, 553 F.2d at 1001; *Laker Airways v. Sabena, Belgian World Airlines*, 731 F.2d 909, 922 (D.C.Cir.1984); Restatement (Third) of the Foreign Relations Law of the United States § 402 (1987) [hereinafter Restatement]. The only question in this case is whether Congress exercised that power.

The majority correctly notes that because jurisdiction to prescribe is ordinarily exercised on the basis

of territory rather than nationality,[3] there is a presumption that Congress intends legislation to apply only within the territorial jurisdiction of the United States, unless a contrary intent appears. *Steele*, 344 U.S. at 285, 73 S.Ct. at 255; *Foley Bros.*, 336 U.S. at 285, 69 S.Ct. at 577-78; *Blackmer*, 284 U.S. at 437, 52 S.Ct. at 254-55; *Mitchell*, 553 F.2d at 1002. The majority goes astray, however, in its determination of what constitutes an expression of "contrary intent" sufficient to overcome the presumption.

As will be demonstrated more fully below, this is not a case in which the claim of extraterritorial jurisdiction is based solely on the broad jurisdictional language of the statute. Rather, the conclusion that Title VII was intended to apply to U.S. citizens employed abroad by U.S. corporations is compelled by canons of statutory construction and is further supported by legislative history. In rejecting these traditional methods of statutory interpretation as inadequate, the majority implies that nothing short of an explicit statement by Congress will overcome the presumption.

The classic formulation of the presumption, however, does not impose such a stringent standard: "The canon of construction which teaches that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States . . . is a valid approach whereby *unexpressed* congressional intent may be ascertained." *Foley Bros.*, 336 U.S. at 285, 69 S.Ct. at 577 (emphasis added) (citation omitted); *Natural Resources*

[3] Territory and nationality are the two universally recognized bases for a state's exercise of jurisdiction to prescribe law. Restatement § 402 comment a (also noting that these links may not be sufficient in all cases). Territoriality, however, "is considered the normal, and nationality an exceptional, basis for the exercise of jurisdiction." *Id.* comment b.

Defense Council v. Nuclear Regulatory Comm'n, 647 F.2d 1345, 1357 n. 54 (D.C.Cir.1981). The most established method of ascertaining unexpressed congressional intent is to apply principles of statutory construction, and to refer to the legislative history of the act. *See* N. Singer, 2A Sutherland Statutory Construction §§ 45.12, 48.06 (1984). Nothing in this formulation indicates that a "contrary intent" sufficient to overcome the presumption against extraterritoriality may not be determined according to these ordinary methods.

Even if we add the adjective "clear" to our formulation of the presumption, *Mitchell*, 553 F.2d at 1002,[3] "clear" does not mean "express," and there is no reason why a "clear" intent to apply a statute extraterritorially may not be determined with reference to the rules of statutory construction, informed by legislative history. At most, requiring a "clear" expression of congressional intent may mean that the broad jurisdictional language of a statute is not sufficient in itself to support the exercise of extraterritorial jurisdiction. *See Mitchell*, 553 F.2d at 1003-04. It should be noted, however, that the Supreme Court *has* found such language sufficient to overcome the presumption.[4]

[3] Though *Mitchell* cites *Steele* and *Foley Bros.* as support for its formulation of the presumption, neither case requires that Congress' expression of "contrary intent" be "clear." 553 F.2d at 1002 (citing *Steele*, 344 U.S. at 285, 73 S.Ct. at 255, *Foley Bros.*, 336 U.S. at 285, 69 S.Ct. 577-78). For the purposes of this case, however, I recognize that we are bound by *Mitchell's* interpretation of these cases.

[4] In *Foley Bros.*, the Supreme Court held that such language was not sufficient to support extraterritorial jurisdiction. 336 U.S. at 287, 69 S.Ct. at 578-79. However, in *Steele*, decided three years later, the Court found that the broad jurisdictional

The extremely strong showing of congressional intent which the majority requires is clearly not compelled by the presumption itself. Rather, it appears that the majority has distorted the presumption in an effort to transform it into something it is not: a mechanism for evaluating potential conflicts of jurisdiction.[5] The majority concludes in effect that the policy implications of applying Title VII extraterritorially are so serious that we must require a more explicit statement by Congress that it intended Title VII to apply so broadly.

The majority's conclusion might be appropriate if Congress was, as the majority claims, silent on this subject. But Congress was not silent on the subject.

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language of the Lanham Act was sufficient to support the exercise of extraterritorial jurisdiction over U.S. nationals abroad. 344 U.S. at 286-87, 73 S.Ct. at 255-56.

In *Mitchell*, this court rejected the government's argument that use of the term "moratorium" in the Marine Mammal Protection Act, without reference to the geographic scope of the provision, indicated an intent by Congress to extend the moratorium against the taking of marine mammals world wide. 553 F.2d at 1003. Citing *Foley Bros.*, the court reasoned that such "all inclusive language" was not sufficient, by itself, to support extraterritorial jurisdiction. *Id.* at 1003-04.

[5] Quoting from *Pfeiffer v. Wm. Wrigley, Jr. Co.*, 755 F.2d 554 (7th Cir.1985), the majority maintains that the presumption arises from "[t]he fear of outright collisions between domestic and foreign law—collisions both hard on those caught in the cross-fire, and a potential source of friction between the United States and foreign countries."

It is true that by requiring a threshold showing of congressional intent, the presumption will in practice prevent unnecessary conflicts of law. Once that threshold showing has been established, however, we must turn to other mechanisms for resolving the conflicts of law that inevitably arise from the exercise of extraterritorial jurisdiction.

Rather, we have evidence that Congress did consider the implications of applying Title VII extraterritorially: Congress included in the statute a provision explicitly exempting aliens employed abroad by U.S. corporations *in order to avoid conflicts of law*. It follows logically that Congress believed that application of Title VII to U.S. citizens employed abroad by U.S. corporations would not present similar barriers to the exercise of extraterritorial jurisdiction.[6] In concluding that the statute should not apply to U.S. citizens employed abroad, the majority has therefore done precisely what it cautions against: It has substituted its own policy judgment for that of Congress.

The majority's intuition is correct that the implications of applying a statute extraterritorially *may* be such that the type of evidence presented in this case would not be sufficient to support the exercise of extraterritorial jurisdiction. For example, a greater showing of congressional intent would be required to support an exercise of extraterritorial jurisdiction that would violate international law. A statute may not be construed to violate international law unless Congress has, by an affirmative expression of its intent, required that construction. *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 21-22, 83 S.Ct. 671, 677-78, 9 L.Ed.2d 547 (1963); *Weinberger v. Rossi*, 456 U.S. 25, 32, 102 S.Ct. 1510, 1515-16, 71 L.Ed.2d 715 (1982); *see also* Restatement § 114.[7]

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[6] This argument is advanced in more detail below.

[7] Although the majority cites *McCulloch* in its discussion of the presumption against extraterritoriality, *McCulloch* did not turn on the issue of extraterritorial jurisdiction. Indeed, the presumption against extraterritoriality is not even mentioned in the opinion. Rather, the Supreme Court in *McCul-*

This principle is a facet of the separate presumption that Congress does not intend to violate international law. *See* Restatement § 115 comment a ("It is generally assumed that Congress does not intend to repudiate an international obligation of the United States by nullifying a rule of international law or an international agreement as domestic law.").

The showing of congressional intent required to overcome the presumption that Congress does not in-

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loch found that application of the National Labor Relations Act to protect foreign seamen, employed on vessels registered under a foreign flag, would violate State Department policy, a Treaty with the Honduran government, and the established principle of international law that the internal affairs of a vessel are to be regulated according to "the law of the flag state." *Id.*, 372 U.S. at 20-21 & n. 12, 83 S.Ct. 677 n. 12. The Court held that absent "[t]he affirmative intention of Congress clearly expressed," the NLRA could not be construed to apply to foreign seamen employed aboard vessels registered under a foreign flag because such a construction would violate the law of nations. *Id.* at 21-22, 83 S.Ct. at 677-78.

The standard set forth in *McCulloch* is thus not an elaboration upon the presumption against extraterritoriality, but an application of the long-standing principle that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains." *Id.*, *quoting The Charming Betsy*, 2 Cranch 64, 118, 2 L.Ed. 208 (1804)); *accord* Restatement section 114; *see also Rossi*, 456 U.S. at 32, 102 S.Ct. at 1515-16 (citing *McCulloch* for this proposition, and construing statute to avoid repudiation of several international agreements, absent affirmative expression of Congress requiring that construction).

McCulloch, therefore, stands for the proposition for which it is cited in the text: a statute may not be construed to violate international law unless Congress has, by an affirmative expression of its intent, required that construction. 372 U.S. at 21-22, 83 S.Ct. at 677-78; *Rossi*, 456 U.S. at 32, 102 S.Ct. at 1515-16.

tend to violate international law is much greater than that required to overcome the presumption against extraterritoriality. While the two presumptions are in some respects parallel, they should not be conflated because not every exercise of extraterritorial jurisdiction violates international law. A separate, more stringent standard is properly reserved for cases in which the exercise of jurisdiction, extraterritorial or otherwise, would violate international law.

By requiring a more explicit showing of congressional intent to apply Title VII extraterritorially—without discussing whether extraterritorial application of Title VII would violate international law—the majority has implicitly conflated the two standards and has therefore defeated congressional intent without sufficient justification.

While I agree with the majority that we must consider the foreign policy implications of construing a statute to apply extraterritorially, I do not believe that its approach to these issues is satisfactory. We should not defeat congressional intent to exercise extraterritorial jurisdiction without engaging in a more principled analysis of the implications of applying the statute extraterritorially.[8]

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[8] In suggesting that we evaluate these concerns, I do not propose that we overstep our judicial role by intruding on the realm of international affairs which is properly the province of the legislative and executive branches. I propose simply that if the evidence of congressional intent to apply Title VII extraterritorially is sufficient to overcome the (properly applied) presumption against extraterritoriality, we should give effect to that intent unless we are precluded by principles of international law from doing so. This undertaking is entirely consistent with our judicial role. *See* Restatement § 111(1)-(2) (International law is the law of the United States and within the judicial power of the United States.).

In order to evaluate the complex issues raised in this case, we need a finer set of analytic tools than those employed in the majority opinion. I therefore propose an alternative framework that will, I believe, provide a more satisfactory treatment of the issues in this case.

The starting point for our analysis in this case should be section 403 of the Restatement which provides that as a matter of international law "a state may not exercise jurisdiction to prescribe law with respect to a person or activity having connections with another state when the exercise of such jurisdiction is unreasonable." § 403(1)). The factors enumerated in the Restatement provide a framework within which we can evaluate in a principled fashion the implications of applying Title VII extraterritorially.[9] *See American Rice, Inc. v. Arkansas Rice Growers Cooperative Ass'n*, 701 F.2d 408 (5th Cir.1983) (applying elements similar to reasonableness test to determine whether exercise of extraterritorial jurisdiction under Lanham Act was appropriate).

Moreover, because section 403 is a principle of international law, a statute may not be construed to violate the principle absent an explicit, affirmative ex-

[9] The Supreme Court's language in *Steele* suggests such a two-pronged inquiry: "the United States is not debarred by any rule of international law from governing the conduct of its own citizens upon the high seas or even in foreign countries when the rights of other nations or their nationals are not infringed." 344 U.S. at 286, 73 S.Ct. at 255-56. Thus, if the rights of other nations or their nationals are not infringed, an act of Congress may be given the full geographic scope that Congress intended. The reasonableness inquiry is a means by which we can determine whether foreign rights or interests would be infringed such that extraterritorial application of a statute would be inappropriate.

pression of congressional intent compelling that construction. *See McCulloch*, 372 U.S. at 21-22, 83 S.Ct. at 677-78; *Rossi*, 456 U.S. at 32, 102 S.Ct. at 1515-16; Restatement § 403 comment g. Thus, a statute will not be applied extraterritorially where it would be unreasonable to do so, unless Congress has affirmatively required that it be so applied. If extraterritorial application of Title VII would be unreasonable, the majority's conclusion would be correct—because Congress has not *affirmatively* required that the statute be applied extraterritorially.

If, however, extraterritorial application of the statute would not be unreasonable, and therefore would not violate international law, the threshold level of congressional intent required to overcome the presumption against extraterritoriality will be sufficient to support the exercise of extraterritorial jurisdiction. As explained above, no express statement of Congress is required to overcome the presumption. *See Foley Bros.*, 336 U.S. at 285, 69 S.Ct. at 577-78. Rather, we may employ traditional methods of statutory interpretation to determine whether the language and legislative history of Title VII evidence a clear intent that the statute be applied extraterritorially.

This analysis will insure that we accord proper respect both to the sovereignty of other nations and to Congress' intent.

II. The "Jurisdictional Rule of Reason."

The showing of congressional intent necessary to support an exercise of extraterritorial jurisdiction depends in the first instance on whether that exercise of jurisdiction will violate international law. Before examining the language and legislative history of Title

VII, I will therefore consider whether extraterritorial application of Title VII would violate the principle of international law set forth in section 403 of the Restatement: "[A] state may not exercise jurisdiction to prescribe law with respect to a person or activity having connections with another state when the exercise of such jurisdiction is unreasonable." [10] Restatement § 403(1). Although the majority does not address this issue in its opinion, ARAMCO and Amicus Curiae assert that extraterritorial application of Title VII would violate the "reasonableness" principle. ARAMCO's arguments are addressed in the discussion below.

It should be noted at the outset of this discussion that section 403 is couched in general terms; it does

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[10] Most courts have applied the "reasonableness" principle to consider whether it would be appropriate to moderate their own enforcement of a statute that has already been held to apply extraterritorially. *See, e.g., American Rice, Inc. v. Arkansas Rice Growers Cooperative Association*, 701 F.2d 408 (5th Cir.1983) (Lanham Act); *Laker Airways v. Sabena, Belgian World Airlines*, 731 F.2d 909 (D.C.Cir.1984) (Sherman Act). This was the approach endorsed by section 40 of the Second Restatement, the precursor of section 403.

The Third Restatement, however, asserts that section 403 is intended to be more than a principle of comity: "reasonableness is understood here . . . as an essential element in determining whether, as a matter of law, the state may exercise jurisdiction to prescribe." Restatement sec. 403 reporters' note 10.

No court has applied the reasonableness test as part of the threshold inquiry to determine whether a statute may, as a general matter, be applied extraterritorially. The Restatement, however, notes that the reasonableness test may serve the same purpose as the traditional tests for deciding whether a statute may be applied extraterritorially. *Id.* reporters' note 2.

not purport to eliminate all conflicts in the exercise of jurisdiction. *See* Restatement § 403 comment d ("Exercise of jurisdiction by more than one state may be reasonable—for example, when one state exercises jurisdiction on the basis of territory and the other on the basis of nationality."). Therefore, the possibility that a conflict with foreign law may arise in some cases does not render Congress' initial exercise of extraterritorial jurisdiction unreasonable. "Because Congress . . . can neither anticipate nor resolve all conflicts with foreign prescriptive jurisdictions," it necessarily relies on the Judiciary to minimize conflicts of jurisdiction by exercising a jurisdictional rule of reason in individual cases. *Laker Airways*, 731 F.2d at 952 n. 169 (citing *Extraterritoriality and Conflicts of Jurisdiction*, U.S. Department of State Current Policy Bulletin No. 481 at 4 (15 April 1983)). Our inquiry here is therefore whether to apply Title VII extraterritorially, not whether it would in all cases be reasonable.

Section 403(2) provides:

> Whether exercise of jurisdiction over a person or activity is unreasonable is determined by evaluating all relevant factors, including, where appropriate:
>
> (a) the link of the activity to the territory of the regulating state, *i.e.*, the extent to which the activity takes place within the territory, or has substantial, direct, and foreseeable effect upon or in the territory;
>
> (b) the connections, such as nationality, residence, or economic activity, between the regulating state and the activity to be regulated, or between that state and those whom the regulation is designed to protect;

(c) the character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted;

(d) the existence of justified expectations that might be protected or hurt by the regulation;

(e) the importance of the regulation to the international political, legal, or economic system;

(f) the extent to which the regulation is consistent with the traditions of the international system;

(g) the extent to which another state may have an interest in regulating the activity; and

(h) the likelihood of conflict with regulation by another state.

The arguments that extraterritorial application of Title VII would be unreasonable fall into two categories encompassing the factors listed above: First, since discrimination against U.S. citizens that occurs abroad has no domestic effects, U.S. interests are not sufficient to justify the exercise of extraterritorial jurisdiction. Second, because labor relations are a peculiarly domestic matter, it would be an affront to the sovereignty of other nations to apply Title VII extraterritorially.

The first contention mischaracterizes the purpose of Title VII and trivalizes the special nature of civil rights laws. The "effects" factor included in the Restatement is well-suited for economic regulation, but not for individual rights of the sort guaranteed by

Title VII. It is true that the purposes of Title VII were framed in part in economic terms,[11] but the 1964 Civil Rights Act, of which Title VII is a part, was also an effort to fulfill the long-postponed promise of equal rights embodied in the fourteenth amendment: [12] It was intended not only to remedy domestic economic ills, but to protect individuals from "the injustices and humiliations" of discrimination. H.R.Rep. No. 914, 88th Cong., 1st Sess. 2018 (1963).

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[11] The language regarding the economic effects of discrimination provides a basis for Congress' exercise of power under the Commerce Clause. *See Heart of Atlanta Motel v. United States*, 379 U.S. 241, 85 S.Ct. 348, 13 L.Ed.2d 258 (1964); *Katzenbach v. McClung*, 379 U.S. 294, 85 S.Ct. 377, 13 L.Ed.2d 290 (1964) (upholding Title II of the Civil Rights Act of 1964 as exercise of Congress' power under the Commerce Clause).

[12] This purpose is evident from the introductory language to the section which states that Title VII is necessary "[t]o remove obstructions to the free flow of commerce among the States and with foreign nations" and "[*t*]*o insure the complete and full enjoyment by all persons of the rights, privileges, and immunities secured and protected by the Constitution.*" H.R.Rep. No. 914, 88th Cong., 1st Sess. (1963) (emphasis added).

The fact that it was upheld as an exercise of Congress' power under the Commerce Clause, does not eclipse the fact that one purpose of the Civil Rights Act was to insure the protection of rights under the fourteenth amendment. *See Heart of Atlanta Motel*, 379 U.S. at 250, 85 S.Ct. at 354 (declining to decide whether Congress' power under the Enforcement Clause of the fourteenth amendment would be sufficient by itself to support enactment of Title II of the Act (public accommodations)); *cf. id.* at 284, 85 S.Ct. at 371-72 (Douglas, J., concurring) (While "economic aspects of the problems of discrimination are heavily accented[,] . . . the objectives of the Fourteenth Amendment were by no means ignored.").

In calling for passage of the civil rights legislation that became the Civil Rights Act of 1964, President Kennedy stated: "In this year of the emancipation centennial, justice requires us to insure the blessings of liberty for all Americans and their posterity —*not merely for reasons of economic efficiency, world diplomacy, and domestic tranquility—but, above all, because it is right.*" Special Message to Congress by the President June 19, 1963 in 109 Cong. Rec. 1055, 1063 (emphasis added).

Because they create individual rights, civil rights laws, unlike economic regulations, fall within the category of "protection of persons." *See* 2 Restatement introductory note to part VII at 150-51.[13] The personal injuries cased by employment discrimination cannot readily be characterized in terms of their "effects" on the forum state. Civil rights are in this respect similar to constitutional guarantees of individual rights which control the exercise of governmental authority over U.S. citizens outside the territory of the United States—without reference to the domestic "effects" of violating the Constitution. *Id.* § 721 reporters' note 2. While regulation of the conduct of private employers under Title VII is obviously different from the regulation of state actors under the Constitution,[14] my point here is simply that the rights protected by Title VII are, like constitu-

[13] Indeed, in the same section, the Restatement notes without criticism that "[s]ome United States civil rights legislation protects United States nationals outside the United States." Restatement § 721 reporters' note 13 (citing *Bryant*, 502 F.Supp. 472 (D.N.J.1980) (applying Title VII extraterritorially)).

[14] Actions by the State, even outside the territory of the United States, must be constrained by the Constitution because the "United States is entirely a creature of the Constitution." *Reid v. Covert*, 354 U.S. 1, 5-6, 77 S.Ct. 1222, 1224-25, 1 L.Ed.2d 1148 (1956) (plurality opinion of Black, J.).

tional rights, personal. *See id.* comment b. It may therefore be inappropriate [15] to evaluate the violation of civil rights in terms of "effects" on the regulating state, even though the extraterritorial application of civil rights laws may be limited by other considerations not applicable to constitutional rights.

If we were to apply the "effects" standard, however, Congress and the courts have long recognized that apart from the personal injuries of discrimination, the cumulative effects of discrimination are pervasive.[16]

Depriving U.S. citizens of a remedy for discrimination experienced while employed abroad by U.S. companies will almost certainly have some effect in the United States. Title VII provides employees with

[15] The Restatement provides that each of the enumerated factors should be evaluated "where appropriate." Restatement § 403(2).

[16] The same "effects" on commerce which allow Congress to regulate the conduct of private employers under Title VII, *supra* note 11, may be sufficient to establish "effects" in the regulating state within the meaning of section 403. *Cf. Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597, 612 (9th Cir.1976) (noting that Congress' power to regulate foreign commerce is not subject to same restrictions as power to regulate interstate commerce, and effects test for extraterritorial jurisdiction must therefore be informed by "notions of comity and fairness").

Because section 403 requires us to consider other factors in exercising extraterritorial jurisdiction, there is no reason to discard the analysis, already accepted by the courts, that the cumulative economic effects of discrimination are sufficient to justify regulation. *See* L. Tribe, American Constitutional Law 310 (1988) (discussing "cumulative effect" principle as constitutional justification for civil rights legislation).

an avenue to vindicate themselves in the event of an unjust firing, a poor reference, or sudden resignation that is in reality the result of discrimination. Today's decision means that one U.S. citizen assigned to the Saudi office of a U.S. corporation, and another U.S. citizen working for the same company in Texas could experience identical acts of discrimination, but only the latter will have a remedy. This situation creates a dilemma for minorities and women: foreign assignments will be less attractive, while refusal of such an assignment could limit an individual's opportunity for advancement. As the EEOC notes, assignment to a foreign office is frequently a required step on the corporate ladder. Extraterritorial application of Title VII may therefore be necessary to ensure that members of protected groups have equal opportunities with respect to foreign assignments that would affect their employment opportunities in the United States. Extraterritorial application of Title VII would also protect the "justified expectations" of U.S. citizens that they will not lose all protection from discrimination by their employers simply because they have been assigned to a foreign office. Restatement § 403(2)(d).

The territorial connections to the regulating state are in any event buttressed by the fact that both "the person principally responsible for the activity to be regulated" and "those whom the regulation is designed to protect" are in this case U.S. nationals—U.S. corporations [17] and their employees who are U.S. citizens. Restatement § 403(2)(b).

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[17] "Regulating the activities of businesses incorporated within a state is one of the oldest and most established examples of prescriptive jurisdiction." *Laker Airways*, 731 F.2d at 926.

It is also incorrect to characterize Title VII's purposes as purely domestic. The legislative history of Title VII reveals that one purpose of the statute was to improve the image of the United States in the international community at a time when this nation's failure to address discrimination—particularly racial discrimination—had become a source of international criticism and domestic embarassment. H.R.Rep. No. 1370, 87th Cong., 2d Sess. 2156 (1962) (report on Equal Employment Opportunity Act—a forerunner of H.R. 405 which was incorporated into Title VII of H.R. 7152; H.R. 7152 became the Civil Rights Act of 1964) ("continued employment discrimination in the United States casts doubt upon our sincerity in furthering the cause of individual liberty and human dignity"); *See also* Special Message to Congress by the President *supra* at 1055 (legislative inaction on civil rights would result in "weakening the respect with which the rest of the world regards us"). In light of these concerns, the majority's holding today is particularly ironic: U.S. corporations will be allowed to discriminate against U.S. citizens in their foreign offices where their actions will be more immediately visible to other states.

Finally, the international community has adopted a number of conventions calling for an end to discrimination—against many of the groups protected by Title VII.[18] The international consensus condemning

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[18] *See, e.g.*, International Convention on the Elimination of All Forms of Racial Discrimination, 660 U.N.T.S. 195, U.N. Doc. A/6014 (1965); Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 34/180, U.N. Doc. A/34/46 (1979).

Many of these agreements have been signed by the United States, but have not been ratified by the Senate. Most of the

discrimination extends to discrimination in employment. Note, *Equal Employment Opportunity for Americans Abroad*, 62 N.Y.U. L.Rev. 1288, 1298 & nn. 66-69 (1987) (international treaties and agreements as well as the proposed Draft Code of Conduct on Transnational Corporations prohibit discrimination in hiring, pay, and promotions). Since Title VII expands on antidiscrimination principles that have been the subject of international concern, there can be no doubt that the desirability of the regulation is generally accepted, and that the regulation is important to the international community and consistent with the traditions of the international system. Restatement § 403(2)(c), (e) & (f).

The United States' interest in enforcing the civil rights of its citizens against violations by U.S. corporations is therefore not only sufficiently strong to support the exercise of extraterritorial jurisdiction, but also is consistent with the interests of the international community in eradicating discrimination. Congressional intent to apply Title VII extraterritorially should therefore be defeated only if such application would be an affront to the sovereignty of other nations.

ARAMCO and Amicus Curiae argue that labor laws are of particularly local concern, and that most states apply their own labor laws on a territorial basis. They therefore conclude that extraterritorial application of Title VII would offend other nations and produce inevitable conflicts of law—a contention echoed in the majority opinion.

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protections that the United States would owe to its citizens under these agreements are already provided by the Constitution and federal and state law. *See* 2 Restatement introductory note to Part VII at 150.

As noted above, section 403 does not purport to eliminate concurrent jurisdiction. There is no principle of international law which "separates jurisdiction to prescribe into neatly adjoining compartments of national jurisdiction." *Laker Airways*, 731 F.2d at 952.

ARAMCO essentially urges that the untidiness of concurrent jurisdiction may be avoided by applying the reasonableness inquiry to preclude the extraterritorial application of a statute wherever it is possible that another state would exercise jurisdiction over the same activity. This reading, however, also fails to produce a perfectly coherent jurisdictional scheme. Because the reasonableness constraint applies to both the territorial and nationality bases of jurisdiction, the extreme deference to other nations urged by ARAMCO could create a jurisdictional vacuum. We do not know, for example, to what extent a foreign state would enforce its own laws to regulate the employment relationship between a U.S. corporation and employees who are U.S. citizens, or whether it would make its administrative and judicial procedures available to a U.S. employee seeking to bring a grievance against a U.S. employer. A foreign state, applying the principles of section 403 could well conclude that exercise of its territorial jurisdiction would be unreasonable in such a case. Indeed, the cases relied upon by the majority include those in which the courts of the United States have declined to apply the protections of U.S. law in precisely that situation. *See, e.g., Benz v. Compania Naviera Hidalgo*, 353 U.S. 138, 77 S.Ct. 699, 1 L.Ed.2d 709 (1957) (declining to apply the Labor Management Relations Act to wage dispute between foreign employer and foreign crew although

within the territorial jurisdiction of the United States).

International discord does not arise from the existence of concurrent jurisdiction alone as much as it arises from an attempt to regulate the conduct of foreign nationals.[19]

Cases involving extraterritorial application of the Lanham Act divide along precisely this line. Although other nations have concurrent jurisdiction to regulate the use of trademarks in their territory, the United States may, in the absence of an actual conflict of law, apply the Act to the conduct of U.S. nationals abroad. *Steele*, 344 U.S. 280, 73 S.Ct. 252; *American Rice, Inc. v. Arkansas Rice Growers Co-operative Ass'n*, 701 F.2d 408 (5th Cir.1983); *Ramirez & Feraud Chili Co. v. Las Palmas Food Co.*, 146 F.Supp. 594 (S.D.Cal.1956), *aff'd*, 245 F.2d 874 (9th Cir.1957), *cert. denied*, 355 U.S. 927, 78 S.Ct. 384, 2 L.Ed.2d 357 (1958). The Act does not, however, apply extraterritorially to foreign nationals. *Vanity Fair Mills v. T. Eaton Co.*, 234 F.2d 633 (2d Cir.), *cert. denied*, 352 U.S. 871, 77 S.Ct. 96, 1 L.Ed. 2d 76 (1956).

The cases involving extraterritorial application of labor laws similarly demonstrate that an attempt to regulate the conduct of foreign nationals presents the most serious affront to the sovereignty of other nations. In *Foley Bros.*, the Supreme Court refused to

[19] In *Timberlane*, the Ninth Circuit suggested that extraterritorial application of the Sherman Act could be moderated to reduce international tensions by affording greater consideration to the nationality of the parties. The court noted that "applying American laws to American citizens raises fewer problems than application to foreigners." 549 F.2d at 612.

construe the Eight Hour Law to apply extraterritorially to a U.S. national employed by an American contractor in Iran. 336 U.S. 281, 69 S.Ct. 575 (1949). However, the Court emphasized that the Act did not distinguish "between laborers who are aliens and those who are citizens of the United States." *Id.* at 286, 69 S.Ct. at 578. The Court reasoned that if the law was applied extraterritorially to U.S. citizens, it "would be logically inescapable" that the law would apply to aliens employed abroad as well. *Id.* The Court was thus most troubled by the possibility that the law would by logical extension require an intrusion into the realm of "labor conditions which are the primary concern of a foreign country"—the labor conditions of its own citizens. *Id.*

The Court discounted an opinion of the Attorney General construing the Act to apply extraterritorially on the same grounds:

> The opinion . . . proves too much. Although Attorney General Moody denied that incongruous results would flow from his interpretation, it would be anomalous, as we have said, for an act of Congress to regulate the hours of a citizen of Iran at work on a government project there. . . . Since the statute contains no distinction between laborers based on citizenship, Attorney General Stone's reasoning that aliens are not covered points to the conclusion that the statute does not apply to contracts which are to be performed in foreign countries.

Id., 336 U.S. at 289, 69 S.Ct. at 579. The Court thus concludes that absent a distinction between aliens and U.S. citizens employed abroad, the Act must apply to both aliens *and* citizens employed abroad, or to

neither. Therefore, because it would infringe upon the sovereignty of other nations to apply the Law to foreign nationals employed abroad, the Act could not be construed to apply to citizens employed abroad.

Similarly, the Supreme Court in both *Benz v. Compania Naviera Hidalgo*, 353 U.S. 138, 147, 77 S.Ct. 699, 704, 1 L.Ed.2d 709 (1956) (LMRA) and *McCulloch*, 372 U.S. at 21, 83 S.Ct. at 677-78 (NLRA), refused to "run interference in . . . a delicate field of international relations" by construing U.S. labor laws to apply to foreign seamen employed on vessels registered under a foreign flag. While these cases involved principles unique to the law of the sea, the nationality of the parties was clearly a source of concern for the Court.[20]

The alien exemption provision of Title VII, which provides the strongest evidence of congressional intent to apply Title VII extraterritorially, eliminates the very factor which has barred the extraterritorial application of U.S. labor laws.[21] Because this provision

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[20] Neither *McCulloch* nor *Benz* is cited in the Restatement's discussion of the presumption against extraterritoriality. *Benz*, however, is cited in the section on Law of the Sea. § 512 reporters' note 5 (jurisdiction over foreign vessels in port).

[21] The majority cites several other examples of cases in which courts have refused to apply U.S. labor laws extraterritorially. These cases are readily distinguishable: First, the majority cites several cases holding that the Railway Labor Act does not apply extraterritorially. The RLA, however, incorporates a provision of the Interstate Commerce Act which explicitly restricts its application to carriers engaged in transportation within the United States. *See Air Line Stewards and Stewardesses Ass'n v. Trans World Airlines*, 273 F.2d 69, 71 (2d Cir.1959); *Airline Dispatchers*

insures that the statute will *not* intrude on the area of labor relations which is the "primary concern" of foreign nations, extraterritorial application of Title VII is unlikely to offend the sovereignty of other states. *See id.* Furthermore, there is no attempt in this case to impose the requirements of Title VII on foreign corporations employing U.S. citizens abroad—another area likely to be of "primary concern" to foreign states. I would conclude that "the rights of other nations or their nationals are not infringed" by extraterritorial application of Title VII, and therefore "the United States is not debarred by any rule of international law from governing the conduct of its own citizens . . . in foreign countries." *Steele*, 344 U.S. at 285-86, 73 S.Ct. at 255-56. This is not to say that extraterritorial application of Title VII would always be appropriate: it may not be, particularly in the case of an actual conflict of law. The possibility of such conflict is not, however, sufficiently great to render extraterritorial application of Title VII unreasonable.

In fact, Title VII contains provisions that allow conflicts with foreign law to be minimized. For example, this court has allowed an employer to use the bona fide occupational qualification (BFOQ) exception, 42 U.S.C. § 2000e-2(e), to assert the requirements of foreign law as a defense to a Title VII claim.

Ass'n v. Nat'l Mediation Board, 189 F.2d 685, 690 (D.C.Cir.), *cert. denied*, 342 U.S. 849, 72 S.Ct. 77, 96 L.Ed. 641 (1951).

Second, the majority cites cases holding that the Age Discrimination in Employment Act does not apply extraterritorially. The ADEA, however, has been explicitly distinguished from Title VII because it does not contain a provision exempting aliens employed abroad. *Pfeiffer v. Wm. Wrigley, Jr. Co.*, 755 F.2d 554, 559 (7th Cir.1985).

Kern v. Dynaelectron, 577 F.Supp. 1196 (N.D.Tex. 1983), *aff'd mem.*, 746 F.2d 810 (5th Cir.1984) (affirmed on basis of reasons stated by the district court). In *Kern*, the district court held that in extraordinary circumstances, a prohibited classification could itself be a BFOQ. *Id.* at 1201. The plaintiff had alleged discrimination on the basis of religion because Dynaelectron, a U.S. corporation which operated a helicopter pilot service in Saudi Arabia, employed only Moslem pilots to conduct flights from Jeddah to the holy city of Mecca. The employer asserted as his defense a Saudi law prohibiting non-Moslems from entering the holy area of Mecca. The penalty for violation of the law was severe—death by beheading. *Id.* at 1200. The court concluded that under the circumstances, religion was a BFOQ for the job of piloting flights from Jeddah to Mecca. *Id.* at 1201.

Although the availability of the BFOQ defense in cases of less extreme conflicts with foreign law has not been tested, *Kern* indicates that the defense could provide a basis for reconciling legitimate conflicts.[22]

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[22] I do not mean to sugest that courts should not continue to be sparing in their application of the BFOQ defense. In particular, courts should be wary of vague assertions of inconsistent legal reqirements or cultural differences "which might afford [an employer] a pretext that [the granting of] relief would impugn foreign law." *Steele*, 344 U.S. at 280, 73 S.Ct. at 252 (no conflict where Mexican registration of trademark had been cancelled); *see also Fernandez v. Wynn Oil Co.*, 653 F.2d 1273 (9th Cir. 1981) (alleged chauvinism of South American businessmen should not provide basis for holding that being male was BFOQ); Note, *Equal Employment Opportunity for Americans Abroad*, 62 N.Y.U. L.Rev. 1288, 1301-11 (1987) (criticizing use of BFOQ defense as grounds to defeat extraterritorial application of Title VII and as vehicle for avoiding conflicts of law).

The argument that extraterritorial application of Title VII is unreasonable because it would offend the sovereignty of other nations is not persuasive. The fact that another nation may exercise jurisdiction over employment relations on the basis of territory does not render the exercise of U.S. jurisdiction on the basis of nationality unreasonable. The likelihood that concurrent jurisdiction would produce international discord is minimized by the fact that the United States seeks to regulate *only* the conduct of its own nationals and by the fact that Title VII may be reconciled with foreign law in the event of a conflict.

The fact that one could hypothesize particular situations in which the extraterritorial application of Title VII to U.S. citizens employed by U.S. corporations would conflict with foreign law does not compel a holding that Title VII may never extend its protections beyond U.S. borders. This construction of section 403 would place an untenable restriction on U.S. sovereignty. We would be required to defeat congressional intent to apply a statute extraterritorially unless Congress was able to anticipate and resolve every potential conflict of jurisdiction, or unless Congress met the *McCulloch* standard by expressing an affirmative intent to apply a statute extraterritorially whether reasonable or not. This would make extraterritorial jurisdiction an all or nothing proposition, eliminating a middle ground on which Congress could exercise extraterritorial jurisdiction in a more limited fashion. This result in neither compelled by the Restatement nor desirable.

For the purposes of this case, the Restatement requires only that we conclude that extraterritorial application of Title VII would in general be reasonable.

Because Congress *cannot* anticipate every conflict of law, it must necessarily rely on the courts to make a more individualized determination of the propriety of exercising extraterritorial jurisdiction in a particular case. The constraints of section 403 apply to exercises of prescriptive jurisdiction not only by Congress, but by all government entities.[23] The courts will therefore be guided in individual cases by the same principles of reasonableness that apply to our evaluation of Congress' initial exercise of extraterritorial jurisdiction.

Thus, while I would hold that extraterritorial application of Title VII would in general be reasonable, I would also recognize that it may be appropriate in some circumstances for a U.S. court to decline to apply Title VII extraterritorially. In the instant case, the factors that might influence a more individualized decision whether to apply Title VII extraterritorially have not been fully briefed and are therefore not considered here.

III. The Language and Legislative History of Title VII

Since extraterritorial application of Title VII would not be unreasonable and therefore does not violate principles of international law, we do not need

[23] Prescriptive jurisdiction is defined as jurisdiction of a state "to make its law applicable to the activities, relations, or status of persons, or the interests of persons in things, whether by legislation, by executive act or order, by administrative rule or regulation, or by determination of a court." Restatement § 401(a). The traditional equation of jurisdiction to prescribe with *legislative* jurisdiction was discarded in recognition of the increasingly complex relationship between the roles of different branches of government. *Id.* introductory note to Part IV at 230.

to search for an *affirmative* expression of congressional intent to apply Title VII extraterritorially. Rather, we may employ the traditional methods of statutory interpretation to determine whether the presumption against extraterritoriality is overcome by the "contrary intent" of Congress. *See Foley Bros.*, 336 U.S. at 285, 69 S.Ct. at 577-78; *Natural Resources Defense Council v. Nuclear Regulatory Comm'n*, 647 F.2d 1345, 1357 n. 54 (D.C.Cir.1981).

In asserting that Congress intended Title VII to apply extraterritorially,[24] Boureslan and Amicus EEOC rely primarily on the "alien exemption provision," 42 U.S.C. § 2000e-1, which provides in relevant part: "This subchapter shall not apply to an employer with respect to the employment of aliens outside any State." The stated purpose of this provision was "to remove conflicts of law which might otherwise exist between the United States and a foreign nation in the employment of aliens outside the United States by an American enterprise."[25] *Civil Rights:*

[24] It is not disputed that Title VII's definition of "employer" is sufficiently expansive to support application of Title VII beyond the territory of the United States. "Employer" is defined as any "person engaged in an industry affecting commerce" who has a specified number of employees who work a specified number of days. 42 U.S.C. § 2000e(b).

[25] The majority dismisses this piece of legislative history, arguing that we must not "substitute legislative history for the language of the Act." The language of the statute is not, however, inconsistent with the legislative history. Both the plain language of the statute, interpreted according to the established canons of statutory construction, and the legislative history compel a single conclusion: that Congress intended Title VII to apply extraterritorially.

It is instead the majority's conclusion that Title VII does *not* apply extraterritorially that requires us to ignore the

Hearings on H.R. 7152 Before the House Committee on the Judiciary, 88th Cong., 1st Sess. 2303 (1963) (testimony of James Roosevelt, Member of Congress from the State of California) (explaining provisions of H.R. 405 which was incorporated into Title VII of H.R. 7152).[26]

Since Title VII expressly exempts from coverage aliens employed abroad by U.S. corporations, the logical negative inference is that Title VII was intended to cover U.S. citizens employed abroad. Indeed, the alien exemption provisions would be meaningless if Title VII did not apply extraterritorially: there is no need to exempt aliens employed abroad from coverage if *no one* is covered abroad. Construction of a statute to render a provision meaningless violates the established rule of statutory construction which obliges a

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canons of statutory construction and the clear evidence of legislative history.

[26] Contrary to the majority's assertion, the collaborative nature of Title VII's legislative history requires that these hearings be given special weight. H.R. 405 originated in the Committee on Education and Labor, but was incorporated by the Judiciary Committee into H.R. 7152. Title VII is thus a hybrid of bills originating in two committees. Although the Judiciary Committee subsequently amended H.R. 7152, the coverage provisions of Title VII, including the alien exemption provision, were not changed. Representative Roosevelt's explanation of the provisions of H.R. 405, based on the conclusions of the Committee on Education and Labor, is thus equivalent to a committee report for purposes of determining the objectives of the provisions that were incorporated wholesale from H.R. 405. Such discussions of statutory meaning are accepted as the most "persuasive indicia of congressional intent." *Mills v. United States*, 713 F.2d 1249, 1252 (7th Cir.1983), *cert. denied*, 464 U.S. 1069, 104 S.Ct. 974, 79 L.Ed.2d 212 (1984); *see also Johnson v. Department of Treasury*, 700 F.2d 971, 974 (5th Cir.1983).

court "to give effect, if possible, to every word Congress used." *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339, 99 S.Ct. 2326, 2331, 60 L.Ed.2d 931 (1979); *accord United States v. Reeves*, 152 F.2d 995, 998 (5th Cir.1985) ("A statute should be read to avoid rendering its language redundant if reasonably possible."); *Goff v. Taylor*, 706 F.2d 574, 587 n. 34 (5th Cir. 1983) ("It is well established that a statute should be construed so that each of its provisions is given full effect; interpretations which render parts of a statute inoperative or superfluous are to be avoided."); *Quarles v. St. Clair*, 711 F.2d 691, 701 n.32 (5th Cir.1983) (same); *Duke v. University of Texas at El Paso*, 663 F.2d 522, 526 (5th Cir.1981) (same); *Beisler v. Commissioner*, 814 F.2d 1304, 1307 (9th Cir.1987) ("We should avoid an interpretation of the statute that renders any part of it superflous and does not give effect to all of the words used by Congress.").

The majority maintains that it has not deprived the alien exemption provision of all meaning because another negative inference may be drawn from the provision:[27] that aliens are covered by the statute when employed within the United States. The majority relies for this proposition on *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 95, 94 S.Ct. 334, 339-40, 38

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[27] The majority's assertion that the provision still has meaning because it means what it says—that aliens employed abroad are not covered—is purely semantic. As stated above, the alien exemption provision is completely superfluous if the statute does not cover *any* individual employed abroad. There is no difference between interpreting a statute to render a provision superfluous and interpreting a statute to deprive a provision of meaning: Semantic distinctions aside, both violate the canons of statutory construction. *See* cases cited *supra*.

L.Ed.2d 287 (1973), in which the Supreme Court held that Title VII applied to aliens employed in the United States but did not prohibit an employer from discriminating on the basis of citizenship or alienage. That is, Title VII protected aliens from discrimination on the basis of race, religion, color, sex, or national origin, but did not make alienage *itself* a prohibited classification.

The majority's reliance on *Espinoza* is misplaced. The Supreme Court does not rely solely on the negative inference it draws from the alien exemption provision, nor does it discuss the legislative history of the provision which supports the interpretation advanced by Boureslan and the EEOC. It would therefore be erroneous to conclude that the Supreme Court's passing reference in *Espinoza* to the alien exemption provision was intended to attach only one negative inference to the proviso.

A negative inference drawn from the alien exemption provision was not necessary to bring aliens within the scope of Title VII's domestic protections. As the Supreme Court notes in *Espinoza*, the use of the term "individual" in defining "employee" is sufficient to bring aliens within the statute's coverage. *Id* Any construction of the term "individual"—as distinct from "citizen"—to exclude aliens would be inconsistent with principles of equal protection.[28] While the precise level of scrutiny applied to classifications based on alienage has varied,[29] it is well estab-

[28] Principles of equal protection are, of course, incorporated into the due process clause of the fifth amendment and therefore are applicable to acts of the federal government. *Bolling v. Sharpe*, 347 U.S. 497, 74 S.Ct. 693, 98 L.Ed. 884 (1954).

[29] *See* L. Tribe, American Constitutional Law 1544-53 (1988).

lished that aliens are "persons" within the meaning of the fifth and fourteenth amendments, and are entitled to the equal protection of the laws of the United States. *Yick Wo v. Hopkins*, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220 (1886); *Truax v. Raich*, 239 U.S. 33, 36 S.Ct. 7, 60 L.Ed. 131 (1915). Therefore, Congress could not have excluded aliens residing in the United States[30] from the coverage of Title VII without drawing an explicit distinction between aliens and citizens, and providing justification for the distinction sufficient to satisfy equal protection analysis under the due process clause. While it may be appropriate for the Supreme Court to cite the alien exemption provision in support of the obvious conclusion that aliens are covered by Title VII when employed in the United States, the majority's contention that this is the sole meaning to be attached to the provision is nonsensical. Given that aliens are "employees" within the meaning of Title VII in precisely the same sense that citizens are employees, it would be absolutely unnecessary to state that Title VII does not apply to aliens employed abroad unless the statute *did* apply to U.S. citizens employed abroad. Again, the majority's analysis renders the alien exemption clause completely superfluous, in violation of the canons of statutory construction. *See* cases cited *supra*.

Congress' intent to apply Title VII extraterritorially is even more apparent if the alien exemption clause is read in light of the contemporary case law regarding the extraterritorial application of U.S. labor laws and the application of U.S. labor laws to

[30] Equal protection principles "are universal in their application, to all persons within the territorial jurisdiction" of the United States. *Yick Wo.*, 118 U.S. at 369, 6 S.Ct. at 1070-71; *see also* note 28 *supra*.

foreign nationals. The Supreme Court appeared at the time to regard the application of U.S. law to *foreign nationals* as a primary source of conflict with other nations. *See* cases discussed *supra* in section II.

Congress' statement that the alien exemption provision was intended to avoid conflicts of law is perfectly logical in the context of this case law: Congress could reasonably have concluded that exempting aliens employed abroad would eliminate any obstacles to protecting U.S. citizens employed abroad by U.S. corporations.

Taken together, the language and legislative history of Title VII evidence a clear intent of Congress to apply Title VII to U.S. citizens employed abroad by U.S. corporations. This showing is sufficient to overcome the presumption against extraterritoriality. *See Mitchell*, 553 F.2d at 1002.

IV. Conclusion

Although the issue presented in this case—whether Title VII applies to U.S. citizens employed abroad by U.S. corporations—appears simple on its face, its resolution turns on a complex interaction between international law and principles of statutory construction.

The majority errs in attempting to resolve the complex issues raised in this case through a single instrument of analysis: the presumption against extraterritoriality. In the process, the majority distorts the presumption and, in the name of judicial deference to the legislative branch, defeats congressional intent to apply Title VII exterritorially—without reaching the issue that would justify its conclusion: whether extraterritorial application of Title VII would violate international law.

In order to more carefully evaluate whether the evidence of congressional intent presented in this case is sufficient to support an exercise of extraterritorial jurisdiction, I have employed a two-step inquiry.

The first inquiry is whether extraterritorial application of Title VII would violate section 403 of the Restatement which provides that as a matter of international law, a state may not exercise its jurisdiction to prescribe laws affecting persons or activities connected with another state when it is unreasonable to do so.

Applying the factors listed in the Restatement, it is clear that extraterritorial application of Title VII would not in general be unreasonable. First, the interest of the United States in applying its civil rights laws to its own nationals is sufficiently strong to support the exercise of extraterritorial jurisdiction and is consistent with the interest of the international community in eliminating discrimination. Second, extraterritorial application of Title VII would not offend the sovereignty of other nations because the statute does not attempt to regulate the conduct of foreign nationals. ARAMCO's contention that the United States should defer to the jurisdiction of other states to prescribe employment laws within their own territory would, in the absence of any actual conflict of law, place an untenable restriction on the sovereignty of the United States. The potential for conflict is minimized by the fact that Title VII may be construed to reconcile the competing demands of U.S. and foreign law when a conflict does occur.

Since extraterritorial application of Title VII would not violate the principles embodied in section 403, we do not need to search for an *affirmative* statement of congressional intent. The presumption

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against extraterritoriality may be overcome if the language and legislative history of Title VII express a clear (if not affirmative) intent to apply the statute extraterritorially. Applying the canons of statutory construction to the plain language of the statute and referring to the legislative history to determine Congress' intent, only one conclusion is possible: Congress intended that Title VII's protections would extend to U.S. citizens employed abroad by U.S. corporations.

While the exercise of extraterritorial jurisdiction necessarily raises sensitive issues of international law, U.S. employers should not be allowed to escape liability for discrimination by cloaking themselves in a conveniently acquired concern for the integrity of the sovereignty of foreign states. In holding that Title VII affords no protection from employment discrimination to U.S. citizens employed abroad by U.S. corporations, the majority defeats Congress' intent to the contrary. Because I believe that we could give effect to Congress' intent without intruding upon the sovereignty of other nations, I must respectfully dissent.

APPENDIX C

UNITED STATES DISTRICT COURT
S.D. TEXAS
HOUSTON DIVISION

Civ. A. No. H-85-3506

ALI BOURESLAN

v.

ARAMCO, ARABIAN AMERICAN OIL COMPANY
and ARAMCO SERVICES COMPANY

Jan. 27, 1987

MEMORANDUM AND ORDER

DEANDA, District Judge.

Pending before the court are Defendants' motions to dismiss under Rule 12(b)(1) for lack of subject matter jurisdiction. For the reasons stated below, the court finds the motions should be granted.

Plaintiff, Ali Boureslan, is an American citizen who was born in Lebanon and resides in El Paso, Texas. Plaintiff instituted this action against Arabian American Oil Company (Aramco) and Aramco Services Company (ASC). Aramco is a Delaware corporation with its principal place of business in Dhahran, Saudi Arabia. Aramco is licensed to do business in Texas. ASC is a Delaware corporation with its principal place of business in Houston, Texas.

Plaintiff was first employed as an engineer for ASC in Texas beginning July of 1979. In November of 1980 Plaintiff was transferred to work for Aramco in Saudi Arabia. Plaintiff's troubles began in September of 1982, when Plaintiff's supervisor allegedly began harassing Plaintiff about his national origin, race and religion. Plaintiff's status deteriorated, eventually resulting in termination on June 16, 1984. Plaintiff relied on 42 U.S.C. § 2000e for jurisdiction but alleges state law causes of action in addition to his Title VII claim.

Defendants urge the court to dismiss Plaintiff's claims for lack of subject matter jurisdiction. Defendants argue that Title VII does not apply to Plaintiff's employment in Saudi Arabia and Plaintiff's state law claims should be likewise dismissed for lack of pendent jurisdiction.

The case law discussing whether Title VII has extraterritorial application is scant. *Bryant v. International Schools Services*, 502 F.Supp. 472 (D.N.J. 1980), *rev'd on other grounds*, 675 F.2d 562 (3d Cir. 1982), is on point. In *Bryant* the court ruled that Title VII did have extraterritorial application. The court relied on Title VII's exemption of "aliens outside of any State," negatively inferring that Title VII must apply to citizens employed outside the United States. *See* 42 U.S.C. § 2000e-1; 502 F.Supp. at 482. The court cited *Love v. Pullman Co.*, 13 F.E.P. 423 (D.Col.1976), a case in which the court, in a footnote, drew the same negative inference. *See* 13 F.E.P. at 426 n. 4.

Since *Bryant* no court has confronted and ruled on the extraterritorial issue. Several courts have cited *Bryant* in deciding whether the Age Discrimination in Employment Act (ADEA) applies extra-

territorially. *See, e.g., Cleary v. United States Lines, Inc.*, 728 F.2d 607, 609 (3d Cir.1984). The E.E.O.C. has accepted *Bryant* as the law. *See, e.g.*, E.E.O.C. Dec. No. 84-2, 33 F.E.P. 1893 (Dec. 2, 1983). While no circuit court has decided the extraterritorial question, the Court of Appeals for the Third Circuit remarked, in *dicta*, that the reasoning behind the negative inference is controversial. *Cleary*, 728 F.2d at 609.

Indeed, the negative inference underlying the *Bryant* decision is suspect. In *Espinoza v. Farah Manufacturing Co.*, 414 U.S. 86, 94 S.Ct. 334, 30 L.Ed.2d 287 (1973), the Supreme Court drew a different inference from the identical Title VII language. The Court held that by exempting "aliens outside of any State" Congress intended to include aliens inside the United States within Title VII's coverage. 414 U.S. at 95, 94 S.Ct. at 340.

Abandoning the *Bryant* precedent does little more than send the court back to square one. An examination of Title VII's legislative history offers little guidance; the extraterritorial issue is not mentioned. The most that one can glean from the legislative history is that Congress enacted Title VII to remedy domestic discrimination. *See, e.g.*, H.R. Rep. No. 914, 88th Cong., 2nd session, *reprinted in* 1964 U.S. Code Cong. & Ad.News 2355, 2393 (focusing on domestic discrimination). There is no indication that Congress was concerned about discrimination abroad. Legislative efforts in 1964 were directed towards eliminating discrimination in the United States. It is doubtful that Congress considered enacting legislation to counter discrimination against citizens abroad.

Title VII's language does not support extraterritorial application. As previously noted, reliance on the language exempting "aliens outside of any State"

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is erroneous. Additionally, Title VII applies only to "employers." The statute defines "employer" as one "engaged in any industry affecting commerce who has fifteen or more employees. . . ." 42 U.S.C. § 2000e (b). Title VII at Section 2000e(g), defines commerce as

> [T]rade, traffic, commerce, transportation, transmission, or communication among the several States; or between a State and any place outside thereof; or within the District of Columbia, or a possession of the United States; or between points in the same State but through a point outside thereof.

Section 2000e(h) further defines "industry affecting commerce" as including activity or industry affecting commerce within the meaning of the Labor Management Reporting and Disclosure Act of 1959, 29 U.S.C. § 402(c). The Labor Management Reporting and Disclosure Act defines industry affecting commerce as industry included under the Labor Managements Relations Act. Finally, the Supreme Court has held that the Labor Management Relations Act has no extraterritorial application. *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 83 S.Ct. 671, 9 L.Ed.2d 547 (1963); *Benz v. Compania Navieia Hidalgo*, 353 U.S. 138, 77 S.Ct. 699, 1 L.Ed.2d 709 (1957).

A study of the statutory language and legislative history reveals, if anything, that Congress did not intend Title VII to apply extraterritorily. *See Pfeiffer v. Wm. Wrigley, Jr. Co.*, 755 F.2d 554 (7th Cir. 1985). At a minimum, the absence of a clearly expressed intent creates a presumption that Congress did not intend extraterritorial application. *See Foley*

Bros. v. Filardo, 336 U.S. 281, 69 S.Ct. 575, 93 L.Ed. 2d 680 (1949). It is doubtful that Congress reserved the question of Title VII's application for the courts to decide. It is much more likely that Congress never considered the issue.

Examining the development of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621-634 is instructive. When enacted, ADEA was silent on the question of extraterritorial application. Courts struggled with the issue but concluded that Congress did not intend ADEA to apply extraterritorially. *See, e.g., Cleary v. United States Lines, Inc.*, 728 F.2d 607 (3d Cir.1984); *Thomas v. Brown & Root, Inc.*, 745 F.2d 279 (4th Cir.1981). In 1984, Congress amended the ADEA. Congress included in the definition of employee "any individual who is a citizen of the United States employed by an employer in a workplace in a foreign country." 29 U.S.C. § 630(f). Thus, Congress added a clear statement, obviating the need for judicial guesswork.

In *Pfeiffer v. Wm. Wrigley, Jr. Co.*, 755 F.2d 554 (7th Cir.1985), the court held that ADEA did not apply extraterritorially. Judge Posner, writing for the court, found the lack of statutory language and legislative history persuasive. *See id.* at 556-57. The decision is important because the court issued its ruling knowing that Congress amended the ADEA to apply extraterritorially. Judge Posner pointed out that the amendment did not apply retroactively. *See id.* at 559. The court rejected Plaintiff's argument that the amendment clarified the original act. *See id.* Judge Posner asserted that Congress may have intended to change the law, not elucidate it. *See id.*

Following the reasoning in *Peiffer*, even if Congress did amend Title VII to apply extraterritorily,

the court should rule against extraterritorial application. Of course, Congress has not amended Title VII. The court must base its decision on the applicable statute and its legislative history, which do not support extraterritorial application.

Finally, there are significant policy reasons for not applying Title VII abroad. Imposing Title VII abroad infringes on the sovereignty of other nations. Indeed, in the case at hand Saudi Arabia has enacted its own statute, the Labor and Workman Law of 1959. Many of its provisions conflict with Title VII. Given the potential conflict, it should be Congress that mandates extraterritorial application. *See Pfeiffer*, 755 F.2d at 554.

The court thus concludes Title VII should not be applied extraterritorily. Accordingly, Defendants' motions to dismiss under Rule 12(b)(1) should be granted. Plaintiff's state law claims should also be dismissed for lack of pendent jurisdiction. *United Mine Workers of America v. Gibbs*, 383 U.S. 715, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966). The court hereby

ORDERS Defendant Aramco's motion to dismiss under Rule 12(b)(1) is GRANTED. The court further

ORDERS Defendant ASC's motion to dismiss under Rule 12(b)(1) is GRANTED. The court further

ORDERS Plaintiff's state law claims are DISMISSED for lack of pendent jurisdiction.

APPENDIX D

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 87-2206

ALI BOURESLAN, PLAINTIFF-APPELLANT

v.

ARAMCO, ARABIAN AMERICAN OIL CO.
and ARAMCO SERVICE COMPANY,
DEFENDANTS-APPELLEES

Dec. 23, 1988

Appeal from the United States District Court
for the Southern District of Texas;
James DeAnda, Judge

ON SUGGESTIONS FOR REHEARING EN BANC

(Opinion October 17, 1988, 5th Cir., 1988,
857 F.2d 1014)

Before CLARK, Chief Judge, GEE, RUBIN REAVLEY, POLITZ, KING, JOHNSON, WILLIAMS, GARWOOD, JOLLY, HIGGINBOTHAM, DAVIS, JONES, SMITH and DUHE, Circuit Judges.

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BY THE COURT:

A member of the Court in active service having requested a poll on the suggestions for rehearing en banc and a majority of the judges in active service having voted in favor of granting a rehearing en banc,

IT IS ORDERED that this cause shall be reheard by the Court en banc with oral argument on a date hereafter to be fixed. The Clerk will specify a briefing schedule for the filing of supplemental briefs.

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 87-2206

ALI BOURESLAN, PLAINTIFF-APPELLANT

versus

ARAMCO, ARABIAN AMERICAN OIL CO.
and ARAMCO SERVICE COMPANY,
DEFENDANTS-APPELLEES

Appeal from the United States District Court
for the Southern District of Texas

[Filed Nov. 7, 1988]

ORDER:

IT IS ORDERED that the motion of former amicus, the United States Equal Employment Opportunity Commission, for leave to intervene as an appellant in the ongoing appeal of this cause is granted.

/s/ W. Eugene Davis
United States Circuit Judge

APPENDIX F

STATUTORY PROVISIONS INVOLVED

Sections 701(b), 701(g), 701(h), 702, and 703(a) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e(b), 2000e(g), 2000e(h), 2000e-1, 2000e-2(a), provide as follows:

§ 2000e. **Definitions**

For the purposes of this subchapter— * * *

(b) The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or any department or agency of the District of Columbia subject by statute to procedures of the competitive service (as defined in section 2102 of title 5), or (2) a bona fide private membership club (other than a labor organization) which is exempt from taxation under section 501(c) of title 26, except that during the first year after March 24, 1972, persons having fewer than twenty-five employees (and their agents) shall not be considered employers.

* * * * *

(g) The term "commerce" means trade, traffic, commerce, transportation, transmission, or communication among the several States; or between a State and any place outside thereof; or within the District of Columbia, or a possession

of the United States; or between points in the same State but through a point outside thereof.

(h) The term "industry affecting commerce" means any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce and includes any activity or industry "affecting commerce" within the meaning of the Labor-Management Reporting and Disclosure Act of 1959 [29 U.S.C. 401 et seq.], and further includes any governmental industry, business, or activity.

* * * * *

§ 2000e-1. **Subchapter not applicable to employment of aliens outside State and individuals for performance of activities of religious corporations, association, educational institutions, or societies**

This subchapter shall not apply to an employer with respect to the employment of aliens outside any State, or to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.

§ 2000e-2. **Unlawful employment practices**

(a) **Employer practices**

It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to dis-

criminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

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Nos. 89-1838 and 89-1845

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

ALI BOURESLAN and EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Petitioners,

v.

ARABIAN AMERICAN OIL COMPANY and ARAMCO SERVICES COMPANY,
Respondents.

On Petitions for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF IN OPPOSITION FOR RESPONDENTS ARABIAN AMERICAN OIL COMPANY AND ARAMCO SERVICES COMPANY

Of Counsel:
JOHN D. ROADY
HUTCHESON & GRUNDY
3300 Citicorp Center
1200 Smith Street
Houston, Texas 77002

PAUL L. FRIEDMAN
(Counsel of Record)
THOMAS J. O'SULLIVAN
ANNE D. SMITH
WHITE & CASE
1747 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 872-0013
Attorneys for Respondents

June 22, 1990

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QUESTION PRESENTED

Did Congress intend to extend the provisions of Title VII of the Civil Rights Act of 1964 to a U.S.-incorporated employer that employs citizens of the United States exclusively in a foreign country?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	2
STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR DENYING THE PETITION	7
I. THERE IS NO CONFLICT AMONG THE CIRCUITS ON THE QUESTION WHETHER CONGRESS INTENDED TITLE VII TO APPLY EXTRATERRITORIALLY	8
II. THE FIFTH CIRCUIT'S DECISION PROPERLY APPLIED, AND IS CONSISTENT WITH, THIS COURT'S PRECEDENTS	11
A. The Requisite Clear Expression Of Affirmative Intent Cannot Be Found In Title VII's Definition Of Commerce	14
B. The Requisite Clear Expression of Affirmative Intent Cannot Be Found In The Negative Inference From The Alien Exemption Provision	17
III. THE EXTRATERRITORIAL APPLICATION OF TITLE VII IS A POLICY MATTER FOR CONGRESS TO DECIDE	20
CONCLUSION	23
APPENDIX A	1a
APPENDIX B	2a

TABLE OF AUTHORITIES

CASES — Page

Akgun v. *Boeing Co.*, No. C89-1319D (W.D. Wash. June 7, 1990) 9
American Banana Co. v. *United Fruit Co.*, 213 U.S. 347 (1909) 12
Andrus v. *Glover Constr. Co.*, 446 U.S. 608 (1980) 19
Argentine Republic v. *Amerada Hess Shipping Corp.*, 109 S. Ct. 683 (1989) 6, 8, 18
Benz v. *Compania Naviera Hidalgo, S.A.*, 353 U.S. 138 (1957) ..... *passim*
Blackmer v. *United States*, 284 U.S. 421 (1932) 12
Bryant v. *International Schools Servs., Inc.*, 502 F. Supp. 472 (D.N.J. 1980), *rev'd*, 675 F.2d 562 (3d Cir. 1982) 8, 9, 21
Cleary v. *United States Lines, Inc.*, 728 F.2d 607 (3d Cir. 1984) 9
Espinoza v. *Farah Mfg. Co.*, 414 U.S. 86 (1973) 17
Foley Bros. v. *Filardo*, 336 U.S. 281 (1949) 3, 4, 12
Lavrov v. *NCR Corp.*, 600 F. Supp. 923 (S.D. Ohio 1984) 9
Love v. *Pullman Co.*, 13 Fair Emp. Prac. Cas. (BNA) 423 (D. Colo. 1976), *aff'd*, 569 F.2d 1074 (10th Cir. 1978) 8, 9, 21
McCulloch v. *Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10 (1963) ..... *passim*
Sandberg v. *McDonald*, 248 U.S. 185 (1918) 8, 12, 18
Seville v. *Martin Marietta Corp.*, 638 F. Supp. 590 (D. Md. 1986) 9
Steele v. *Bulova Watch Co.*, 344 U.S. 280 (1952) 16
United States v. *Bowman*, 260 U.S. 94 (1922) 12
Vermilya-Brown Co. v. *Connell*, 335 U.S. 377 (1948) 18

STATUTES

Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634 ..... 19, 21, 23
29 U.S.C. § 623(f)(1) 19, 21
29 U.S.C. § 623(h) 21
29 U.S.C. § 623(h)(2) 19

TABLE OF AUTHORITIES—Continued

Page

Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2000e-17 ..... *passim*
42 U.S.C. § 2000e(b) 14, 17
42 U.S.C. § 2000e(g) 13, 15, 17
42 U.S.C. § 2000e(h) 14
42 U.S.C. § 2000e(i) 18
42 U.S.C. § 2000e-1 ..... 5, 13
42 U.S.C. § 2000e-2 17
Comprehensive Anti-Apartheid Act of 1986, 22 U.S.C. §§ 5001-5117 19
22 U.S.C. § 5001 19
Consumer Product Safety Act, 15 U.S.C. §§ 2051-2083 16
15 U.S.C. § 2052(a)(12) 16
Export Administration Act, 50 U.S.C. app. §§ 2401-2420 19
50 U.S.C. app. § 2415(2) 19
Federal Food, Drug and Cosmetic Act, 21 U.S.C. §§ 301-392 16
21 U.S.C. § 321(b) 16
Labor Management Relations Act of 1947, 29 U.S.C. §§ 141-144, 169-187 ..... 7, 14
Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. §§ 401-531 14
29 U.S.C. § 402(c) 14
Logan Act, 18 U.S.C. § 953 19
National Labor Relations Act, 29 U.S.C. §§ 151-168 ..... 7, 14
Noise Control Act of 1972, 42 U.S.C. §§ 4901-4918 16
42 U.S.C. § 4902(7) 16
Radiation Control for Health and Safety Act of 1968, 42 U.S.C. §§ 263b-263h 16
42 U.S.C. § 263c(4) 16
Transportation Safety Act of 1974, 49 U.S.C. §§ 1801-1812 16
49 U.S.C. § 1802(1) 16

TABLE OF AUTHORITIES—Continued

	Page
REGULATIONS	
29 C.F.R. § 1606.1(c) (1970)	10
45 Fed. Reg. 85,633 (1980)	10
TREATISES	
Restatement (Third) of Foreign Relations Law of the United States (1986)	4, 5, 16
LEGISLATIVE MATERIALS	
Foreign Investment and Arab Boycott Legislation: Hearings Before the Subcomm. on International Finance of the Senate Comm. on Banking, Housing and Urban Affairs, 94th Cong., 1st Sess. 165 (1975)	10
H.R. 405, 88th Cong., 1st Sess. (1963)	15
H.R. 7152, 88th Cong., 1st Sess. (1963)	15
Interpretive Memorandum on Title VII, 110 Cong. Rec. 7212 (1964)	14
110 Cong. Rec. 12,811 (1964)	15
129 Cong. Rec. 34,499 (1983)	21
MISCELLANEOUS	
Appellee Aramco Court of Appeals Record Excerpts (No. 87-2206)	22
Decision No. 85-16, Emp. Prac. Guide (CCH) § 6857 (1985)	11
En Banc Brief of *Amicus* Rule of Law Committee, *Boureslan* v. *Aramco*, 857 F.2d 1014 (5th Cir. 1990) (*en banc*) (No. 87-2206)	22
Kirschner, *Extraterritorial Application of Title VII of the Civil Rights Act*, 34 Labor L.J. 394 (1983)	17
Policy Statement No. 88-15, EEOC Compl. Man. (CCH) ¶ 2187 (1989)	11, 19, 20

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

Nos. 89-1838 and 89-1845

ALI BOURESLAN and EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Petitioners,

v.

ARABIAN AMERICAN OIL COMPANY and ARAMCO SERVICES COMPANY,
Respondents.

On Petitions for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF IN OPPOSITION FOR RESPONDENTS ARABIAN AMERICAN OIL COMPANY AND ARAMCO SERVICES COMPANY

Respondents Arabian American Oil Company ("Aramco") and Aramco Services Company ("ASC") respectfully request that this Court deny the petitions for a writ of certiorari filed by the Equal Employment Opportunity Commission ("EEOC") and Ali Salim Boureslan ("Boureslan") that seek review of the *en banc* decision of the United States Court of Appeals for the Fifth Circuit.[1]

---

[1] The information required by Rule 29.1 of the Rules of this Court is included in Appendix A.

OPINIONS BELOW

The *en banc* decision of the court of appeals is reported at 892 F.2d 1271 (1990) (Pet. App. 1a-27a).[2] The panel decision is reported at 857 F.2d 1014 (1988) (Pet. App. 28a-76a). The district court decision that was affirmed by both the panel and the *en banc* court is reported at 653 F. Supp. 629 (1987) (Pet. App. 77a-82a).

STATUTORY PROVISIONS INVOLVED

The most relevant provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2000e-17, and of the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634, are set out in Appendix B, 2a-6a.

STATEMENT OF THE CASE

Aramco was at all relevant times a Delaware corporation whose principal place of business and records were located in Dhahran, Saudi Arabia. Since its inception and until recently, Aramco's business had been the exploration for, production, refining and sale of oil and gas exclusively in Saudi Arabia.[3] ASC, formerly (and at the times relevant to this litigation) a subsidiary of Aramco, is a Delaware corporation headquartered in Houston, Texas.

Petitioner Boureslan is a naturalized American citizen whose national origin is Lebanese, whose race is Arab, and whose religion is Moslem. Boureslan was employed as a cost engineer by ASC in Houston from

[2] "Pet. App." refers to the Appendix to the Petition for Certiorari filed by the Solicitor General on behalf of the EEOC.

[3] Aramco employed a multinational workforce, including Saudi Arab and U.S. citizens as well as citizens of any other countries. As a result of the creation in 1988 of the national oil company of Saudi Arabia, the Saudi Arabian Oil Company (Saudi Aramco), the assets, business and employees of Aramco recently were transferred to Saudi Aramco.

July 1979 to November 1980, when at his request he was transferred to Saudi Arabia to work for Aramco. He remained at Aramco until his employment was terminated as part of a general reduction in force in June 1984.

Boureslan alleged discrimination by his immediate supervisor (a citizen of the United Kingdom) on the basis of national origin, race and religion during part of the period he was employed by Aramco in Saudi Arabia in charges filed against Aramco with the EEOC. He later brought suit against Aramco and ASC in the United States District Court for the Southern District of Texas, alleging violations of Title VII and state law.

Aramco and ASC each moved to dismiss Boureslan's complaint for lack of subject matter jurisdiction.[4] The district court granted the motions, finding that the language and legislative history of Title VII lacked any clearly expressed statement of intent by Congress to apply Title VII extraterritorially. Pet. App. 79a. The district court applied the presumption, articulated by this Court in *Foley Bros.* v. *Filardo*, 336 U.S. 281 (1949), that statutes are generally presumed not to have extraterritorial application, and concluded:

> It is doubtful that Congress reserved the question of Title VII's application for the courts to decide. It is much more likely that Congress never considered the issue.

Pet. App. 81a. The district court also dismissed Boureslan's state law claims.

[4] Respondent ASC also moved to dismiss the complaint on two additional grounds: (i) that Boureslan did not work for ASC at the time of the alleged discrimination, and (ii) that, by failing to assert claims against ASC in his EEOC charges, Boureslan failed to exhaust his administrative remedies against ASC. Pet. App. 30a-31a. ASC maintains, contrary to Petitioner Boureslan's assertion (Boureslan Pet. 4), that the ASC motion was granted on these grounds as well.

A divided panel of the United States Court of Appeals for the Fifth Circuit affirmed the district court's decision. Following this Court's reasoning in *Foley*, the majority held that a statute should not be applied extraterritorially absent a clear expression of intent by Congress. The panel found that "[e]xtraterritorial application is not directly addressed in Title VII" itself (Pet. App. 34a), and that the EEOC had pointed to only three general statements in the extensive legislative history that the EEOC believed supported its argument that the statute applies outside the United States. *Id.* at 37a-38a. The court concluded that these references:

> fall far short of the clear expression of congressional intent required to overcome the presumption against extraterritorial application. . . . To rely on such general policy statements would effectively adopt a presumption in favor of extraterritorial application.

Id. at 38a. Congress simply "did not turn its attention" to the possibility of the extraterritorial application of Title VII, and "[i]t is not for this court to decide this policy issue for the legislative branch." Pet. App. 41a.

The dissenting opinion conceded that "[t]erritoriality is considered the normal, and nationality an exceptional, basis for the exercise of jurisdiction." Pet. App. 44a n.2, quoting *Restatement (Third) of Foreign Relations Law of the United States* § 402 comment b (1986). The dissent also acknowledged the presumption that Congress intends legislation to apply only within the territorial jurisdiction of the United States absent a contrary intent. *Id.* at 43a-44a. Expressly eschewing reliance only on "the broad jurisdictional language" of Title VII (Pet. App. 45a) now relied on by the EEOC (EEOC Pet. 8-9), the dissent nevertheless purported to find the requisite clear congressional intent necessary to overcome the presumption by negative inference from the statute's exemption of employers "with respect to the employment of

aliens outside any State" (42 U.S.C. § 2000e-1, the "alien exemption provision"). Pet. App. 46a-47a, 74a.

Adopting an analytical framework concededly never applied by any court (Pet. App. 51a-52a & n.10), the dissent analyzed the "reasonableness" of applying Title VII extraterritorially "[*b*]*efore* examining the language and legislative history" of the Act. *Id.* at 51a-52a (emphasis added). The dissent concluded that because extraterritorial application would "in general be reasonable" (Pet. App. 67a), "we do not need to search for an *affirmative* expression of congressional intent to apply Title VII extraterritorially." *Id.* at 68a-69a (emphasis in original).[5]

On rehearing *en banc*, the court by a vote of 9-5 again affirmed the district court's dismissal of Boureslan's complaint. Pet. App. 1a-2a, 7a. The *en banc* majority stated that respect for "the right of nations to regulate conduct within their own borders" underlies the established presumption that statutes do not have extraterritorial application unless there is a "clear congressional intent" to so apply them. Pet. App. 2a-3a. It concluded that neither the provisions of Title VII nor the legislative history relied upon by Boureslan and the EEOC indicated such a "clear congressional intent" to apply the Act to employers outside the borders of the United States.

The *en banc* court rejected the argument that a negative inference from the alien exemption provision was a clear expression of congressional intent to apply Title VII extraterritorially. Pet. App. 4a. It found, as had the panel, that both the statutory provisions and the leg-

---

[5] The approach of the dissenting opinion is directly contrary to that taken by the Restatement of Foreign Relations Law, under which one looks first to whether Congress has purported to "prescribe" law outside its own territory and only then to whether its action was reasonable. *See Restatement (Third) of Foreign Relations Law of the United States* §§ 402, 403 and comments.

islative history of Title VII demonstrate a strong "domestic focus." It noted that the language and legislative history of Title VII make repeated references to "United States," "states," and "state proceedings," with no parallel references to foreign countries or procedures. *Id.* at 5a, 39a-40a.

The court also noted that Title VII is "curiously silent" in areas where Congress would be expected to clarify the operation of a statute that applies extraterritorially: Congress did not give the EEOC authority to investigate violations outside the United States; it did not address accommodation of conflicts with foreign discrimination laws, even though it addressed accommodations for state discrimination laws in detail; and it included no venue provision for actions involving foreign violations. Pet. App. 5a. Furthermore, if Title VII applied extraterritorially, the plain language of the Act necessarily would extend to foreign employers and impose Title VII "on a foreign employer who had the grace to employ an American citizen in its own country"—a result the court was reluctant to attribute to Congress. *Id.* at 6a.

Finally, the court noted that Congress knows how to give extraterritorial effect to one of its statutes when it desires to do so, citing *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 109 S. Ct. 683, 691 (1989). Pet. App. 6a. As illustrated by the language of a number of statutes that do apply extraterritorially, Congress is aware of "the need to make a clear statement of extraterritorial application, address the concerns of conflicting foreign law, and provide the usual nuts-and-bolts provisions for enforcing those rights." *Id.* The court declined to conclude that Congress had "balanced Title VII's important goals against the foreign sovereignty concerns that underlie the presumption against extraterritoriality, considered the implications of application abroad and then addressed these concerns by inviting courts to read between the lines." Pet. App. 7a.

REASONS FOR DENYING THE PETITION

1. The petition should be denied because there is no conflict among the circuits on the question whether Congress intended Title VII to apply extraterritorially. Furthermore, the absence of any conflict among the circuits is not overcome either by the existence of a handful of poorly reasoned district court decisions or by the EEOC's own interpretation of Title VII. The supposedly consistent interpretation of Title VII by the EEOC in fact has varied from 1964 to 1988, and the EEOC's first attempt to articulate guidance on how its assumed extraterritorial jurisdiction would work was a policy statement that dates only from September 1988.

2. This Court has consistently held that legislation of Congress is presumed to apply only within the territory of the United States, and that the presumption against extraterritorial application of a statute can be overcome only by a clear and affirmative expression of contrary intent. The Fifth Circuit properly concluded that such a clear expression of congressional intent is not present in the language and legislative history of Title VII.

The requisite clear expression of affirmative congressional intent cannot be found in Title VII's definition of "commerce." The statutes on which Title VII's definitional provisions were based—the Labor Management Relations Act of 1947 and the National Labor Relations Act—have been held by this Court not to have extraterritorial application. *Benz* v. *Compania Naviera Hidalgo, S.A.*, 353 U.S. 138, 142, 147 (1957); *McCulloch* v. *Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 19 (1963).

Nor can the requisite clear expression of intent be found in the negative inference from the alien exemption provision of Title VII. Such a negative inference is not a reliable or proper source of congressional intent to

rebut the presumption against extraterritorial application of a statute. *See Sandberg* v. *McDonald*, 248 U.S. 185, 195 (1918). Congress knows how to provide expressly for extraterritorial application when it wants a statute to apply beyond the borders of the United States. *See Argentine Republic* v. *Amerada Hess Shipping Corp.*, 109 S. Ct. 683, 691 (1989).

3. Only Congress should decide whether U.S. laws should apply to workplaces overseas where U.S. citizens are employed. It alone has the facilities necessary to make such important policy decisions where "the possibilities of international discord are so evident and retaliative action so certain." *Benz* v. *Compania Naviera Hidalgo, S.A.*, 353 U.S. at 147. Congress has not expressed its intent that Title VII apply extraterritorially, and the Fifth Circuit properly declined to make the choices that are assigned to Congress.

I. THERE IS NO CONFLICT AMONG THE CIRCUITS ON THE QUESTION WHETHER CONGRESS INTENDED TITLE VII TO APPLY EXTRATERRITORIALLY

The Fifth Circuit is the first and only court of appeals to have decided the question of the extraterritorial application of Title VII. Although the EEOC cites a number of district court decisions for the proposition that Title VII applies to employers abroad, the district courts that have considered the question all rely on *Bryant* v. *International Schools Servs., Inc.*, 502 F. Supp. 472 (D.N.J. 1980), *rev'd on other grounds*, 675 F.2d 562 (3d Cir. 1982), which based its reasoning on *dicta* in a footnote in *Love* v. *Pullman Co.*, 13 Fair Emp. Prac. Cas. (BNA) 423, 426 n.4 (D. Colo. 1976), *aff'd on other grounds*, 569 F.2d 1074 (10th Cir. 1978). Not only was *Bryant* reversed on appeal, but the Third Circuit ex-

pressly declined to reach the question of Title VII's extraterritorial application: "No court has decided the extraterritorial applicability of Title VII and we find it unnecessary to do so to decide this case." *Bryant* v. *International Schools Servs., Inc.*, 675 F.2d at 577 n.23.[8]

Furthermore, these district court decisions all relied exclusively on a negative inference from the alien exemption provision as the sole basis for applying Title VII to employers of U.S. citizens outside the United States. By arguing in this Court both that the definitional sections of Title VII, rather than the alien exemption provision, are the primary source of extraterritorial jurisdiction (EEOC Pet. 8-9), and (in a slightly different context) that "Congress could not have intended to employ an *exemption* to extend Title VII's coverage . . ." (*id.* at 10 n.6 (emphasis in original)), the EEOC significantly undercuts the reasoning and the already limited precedential value of the very decisions it cites.

In the absence of any conflicting court of appeals decision, the EEOC attempts to enhance the limited significance of the district court decisions it cites by reference to its own interpretation of Title VII in favor of extraterritorial application, going back "at least 15 years." EEOC

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[8] The third case cited by the EEOC is *Seville* v. *Martin Marietta Corp.*, 638 F. Supp. 590 (D. Md. 1986). While *Seville* and the recent district court decision in *Akgun* v. *Boeing Co.*, No. C89-1319D (W.D. Wash. June 7, 1990), adopt *Bryant*'s negative inference rationale, the district court in *Lavrov* v. *NCR Corp.*, 600 F. Supp. 923 (S.D. Ohio 1984), viewed the *Bryant* decision critically and held that Title VII would *not* apply to a foreign corporation employing a U.S. citizen abroad, a view that is contrary to the effect of the EEOC's argument in this case. Furthermore, the circuit in which *Bryant* was decided itself expressed doubt about the propriety of the *Bryant* decision in *Cleary* v. *United States Lines, Inc.*, 728 F.2d 607, 609 (3d Cir. 1984). Thus, existing authorities reflect a variety of views rather than the sharp split of authority suggested by the EEOC. *See* EEOC Pet. 14.

Pet. 14.[7] During the 26 years since the passage of Title VII, however, the EEOC's own views on extraterritorial application have been far from consistent. From 1964 until 1970, it was silent on the issue. In 1970, it issued a regulation stating:

> Title VII of the Civil Rights Act of 1964 protects all individuals, both citizen and noncitizens, *domiciled or residing in the United States*, against discrimination on the basis of race, color, religion, sex, or national origin.

29 C.F.R. § 1606.1(c) (1970) (emphasis added). This regulation was amended to delete the "domiciled or residing" language in 1980, sixteen years after Congress enacted Title VII, "to conform with coverage of Title VII." 45 Fed. Reg. 85,633 (1980). Nothing was substituted for the deleted language, and today the regulation remains silent on the geographic reach of the statute.

In 1985, the EEOC stated in a published decision that Title VII "contains no [statutory] provision specifically

[7] The EEOC also cites then-Assistant Attorney General Scalia's 1975 testimony on the Arab boycott legislation. EEOC Pet. 15. Relying on the negative inference from the alien exemption provision, Assistant Attorney General Scalia testified that the alien exemption provision "implies" that Title VII "is applicable to the employment of United States citizens by covered employers anywhere in the world." *Foreign Investment and Arab Boycott Legislation: Hearings Before the Subcomm. on International Finance of the Senate Comm. on Banking, Housing and Urban Affairs*, 94th Cong., 1st Sess. 165 (1975). The purpose of the testimony, however, was primarily to persuade Congress that Arab boycott legislation was not needed. It is doubtful that the testimony, which by its implication would extend coverage to foreign employers, is a definitive statement of the Justice Department's then-position on the geographic reach of Title VII, especially since the civil enforcement authority for Title VII by then lay with the EEOC, whose regulation at that time suggested a conclusion different from the implication of the testimony. *See infra* pp. 10-11.

addressing its territorial reach" and that "the legislative history of the Act is similarly silent on this issue." Decision No. 85-16, Emp. Prac. Guide (CCH) § 6857 (1985). The agency nevertheless concluded by negative inference from the alien exemption provision that Title VII "does apply to covered employers with respect to their employment of U.S. citizens outside the United States." *Id.* It was not until September 1988, however, immediately before the panel decision in this case was rendered, that the EEOC issued a general policy statement that Title VII applied to employers of U.S. citizens in foreign countries. Policy Statement No. 88-15, EEOC Compl. Man. (CCH) § 2187 (1989).

Thus, in 1975 when the General Counsel of the EEOC wrote to the Senate Foreign Relations Committee in support of the extraterritorial application of Title VII (EEOC Pet. 14), his statement was contrary to the EEOC's own regulation that was then in force. In fact, for 24 years the EEOC never articulated any guidance as to how its assumed extraterritorial jurisdiction was to be exercised, and for at least ten of the last 20 years the agency's own regulation was directly contrary to the position the EEOC now claims it has held consistently.

In contrast, the Fifth Circuit's decision in this case is the first thoughtful judicial examination of the issue of the extraterritorial application of Title VII by any court and the only decision by a court of appeals. The law on this question has not been developed in any other circuit, which is reason enough for this Court to deny review.

II. THE FIFTH CIRCUIT'S DECISION PROPERLY APPLIED, AND IS CONSISTENT WITH, THIS COURT'S PRECEDENTS

The Fifth Circuit's carefully reasoned decision that the language and legislative history of Title VII do not reflect the necessary clear expression of congressional intent to apply Title VII extraterritorially is soundly based

on, and consistent with, this Court's decisions concerning the extraterritorial application of legislation. It therefore should not be subject to further review.

The panel and *en banc* majorities correctly started with the established presumption that "the legislation of the Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States. . . ." *Foley Bros.* v. *Filardo*, 336 U.S. 281, 285 (1949). Pet. App. 3a, 32a.[8] Noting the fundamental concept of sovereignty—"[t]he respect for the right of nations to regulate conduct within their own borders"—that underlies this presumption, the court determined that the suggestion of contrary congressional intent advanced by petitioners was insufficient to overcome the presumption against extraterritorial application of Title VII. *Id.* at 2a.

The EEOC concedes that when faced with the question whether Congress intended extraterritorial application of other statutes that regulate "the relationship between employer and employee" (EEOC Pet. 11), this Court always has found that Congress must express its purpose clearly and affirmatively. *McCulloch* v. *Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 21-22 (1963); *Benz* v. *Compania Naviera Hidalgo, S.A.*, 353 U.S. 138, 147 (1957); *Foley Bros.* v. *Filardo*, 336 U.S. 281, 285 (1949). As this Court stated in *Benz*:

> [S]uch a 'sweeping provision' as to foreign applicability was not specified in the Act . . . . For us to run interference in such a delicate field of international relations there must be present *the affirmative intention of the Congress clearly expressed.*

[8] In applying this presumption, the Fifth Circuit followed a long line of authority, including *Blackmer* v. *United States*, 284 U.S. 421, 437 (1932); *United States* v. *Bowman*, 260 U.S. 94, 98 (1922); *Sandberg* v. *McDonald*, 248 U.S. 185, 195 (1918); and *American Banana Co.* v. *United Fruit Co.*, 213 U.S. 347, 357 (1909).

353 U.S. at 146-147 (emphasis added). The identical language was used again by this Court in *McCulloch*. 372 U.S. at 21-22. The EEOC attempts to avoid the clear import of these decisions by arguing that while Title VII admittedly regulates "the relationship between employer and employee and thus operates in a field in which other statutes have been held not to apply extraterritorially," it is a statute prohibiting discrimination and not just one regulating employment. EEOC Pet. 11-12. This argument is unconvincing.[9]

Put in its most basic terms, the EEOC argues that the presumption against extraterritorial application of U.S. laws long recognized by this Court is overcome in this case by two provisions in the language of Title VII: (1) the statute's definition of "commerce", which includes the phrase "or between a State and any place outside thereof," 42 U.S.C. § 2000e(g), and (2) a negative inference from the exemption of employers "with respect to the employment of aliens outside any State," 42 U.S.C. § 2000e-1, from which petitioners infer the coverage of U.S. citizens employed outside of any state. EEOC Pet. 8-9. These provisions, plus one sentence from one committee report in the extensive legislative history of Title VII, are asserted to be a sufficient expression of congressional intent

[9] The EEOC concedes that where the application of a statute extraterritorially would violate international law, an even "more stringent variant of the presumption" applies. EEOC Pet. 7 n.4. It suggests, however, that the presumption should not be as stringent here because the application of Title VII extraterritorially "would not violate international law." *Id.* Leaving aside the doubtful accuracy of this unsupported assertion, the prospects for strains in international relations, infringements of sovereignty, conflicts with foreign laws, cultures, values and religions, and the practical problems involved are simply too great to extend Title VII to foreign workplaces in the absence of a specific and clear expression of affirmative intent.

to overcome the presumption against extraterritorial application of U.S. laws. *Id.* at 10-11.[10]

A. The Requisite Clear Expression Of Affirmative Intent Cannot Be Found In Title VII's Definition Of "Commerce"

Title VII defines "employer" as "a person engaged in an industry affecting commerce," 42 U.S.C. § 2000e(b), and defines "an industry affecting commerce" by reference to the meaning of "affecting commerce" in the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. § 402(c). 42 U.S.C. § 2000e(h). That Act in turn defines "industry affecting commerce" as an industry included under the Labor Management Relations Act. This Court expressly has held that the Labor Management Relations Act does not have extraterritorial application. *Benz* v. *Compania Naviera Hidalgo, S.A.*, 353 U.S. at 142, 147.

The legislative history of Title VII also refers to the National Labor Relations Act ("NLRA"), 29 U.S.C. §§ 151-168. *See* Interpretive Memorandum on Title VII, 110 Cong. Rec. 7212 (1964) ("The term 'affecting commerce' is also familiar, since this is the standard of coverage employed in the National Labor Relations Act . . ."). Yet even though the NLRA contained broad language that clearly referred by its terms to foreign commerce, this Court refused to find a congressional intent to apply the NLRA extraterritorially because there was not "any specific language" in the Act reflecting congressional intent to do so. *McCulloch* v. *Sociedad Nacional de Marineros de Honduras*, 372 U.S. at 19.

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[10] The impact of this sentence, which referred to a House bill that contained references to "foreign commerce" and "foreign nations" that were later deleted (*see infra* p. 15), is diluted by the indirect nature of the subcommittee's role in developing the legislation that became Title VII. *See* Pet. App. 40a-41a n.4.

Significantly, Title VII as passed by the House of Representatives originally contained specific language that referred to "foreign commerce" and "foreign nations." The Senate deleted this language from the earlier House version, and Congress passed the Senate version.[11] These actions are wholly inconsistent with the notion of a clearly expressed congressional intent to apply Title VII extraterritorially. Indeed, they evidence a decision by Congress not to have the statute extend to employers operating overseas.

Perhaps because of this legislative history and the *Benz* and *McCulloch* decisions of this Court, the dissent did not rely on the definitional sections of Title VII relating to "employer," "commerce" and "industry affecting commerce"—including the phrase "between a State and any place outside thereof" in Title VII's definition of the term "commerce." 42 U.S.C. § 2000e(g). Rather, it characterized them as "traditional Commerce Clause language" that serves merely as "a 'nexus' requirement, providing a basis for Congress's exercise of power under the Commerce Clause." Pet. App. 18a. The EEOC, in contrast to the dissent and unlike its arguments below, now characterizes that language as an affirmative, clear statement of congressional intent to extend Title VII's cover-

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[11] Section 2 of H.R. 405 (later part of Section 701 of Title VII of H.R. 7152) as passed by the House of Representatives included a finding by Congress that the practice of employment discrimination "adversely affects the domestic *and foreign commerce* of the United States" (section 2(a)), and a declaration that the provisions of the Act were necessary, *inter alia*, "[t]o remove obstructions to the free flow of commerce among the States *and with foreign nations* (section 2(c)(1)) (emphasis added). H.R. 405, 88th Cong., 1st Sess. (1963); H.R. 7152; 88th Cong., 1st Sess. (1963).

These provisions were deleted by the Senate. Senator Dirksen inserted an annotated copy of the House bill that reflects the deletion of the foreign commerce language in the Congressional Record on June 5, 1964 in anticipation of debate on the Senate's substitute bill, the Dirksen-Mansfield Amendment. 110 Cong. Rec. 12,811-817 (1964) (remarks of Sen. Dirksen).

age to employers of United States citizens abroad. EEOC Pet. 8.

In furtherance of its recast argument, the EEOC relies on an assertedly similar "broad jurisdictional grant in the Lanham Act" that this Court held to apply extraterritorially in *Steele* v. *Bulova Watch Co.*, 344 U.S. 280, 286 (1952). EEOC Pet. 8-9. The Lanham Act, in contrast to Title VII, however, also contained a clear statement of congressional intent to regulate the domestic effects within the United States of the use of deceptive or misleading trademarks overseas, and the Court relied on those direct effects to reach its conclusion. *Steele* v. *Bulova Watch Co.*, 344 U.S. at 283-84.[12] It is unavailing for the EEOC to rely on the Lanham Act as a basis for Title VII's asserted broad jurisdictional reach in view of Title VII's own definitional provisions and legislative history and the decisions of this Court in *Benz* and *McCulloch*.[13]

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[12] The EEOC attempts to rely on *Steele* and other decisions involving the antitrust, trademark, and securities laws of the United States where the laws are intended to reach economic conduct abroad having a direct and substantial effect within the United States. EEOC Pet. 6 n.3. Decisions relying on the direct effects principle, however, are not authority for the extraterritorial application of statutes regulating local and domestic activities such as labor, health and safety practices. *See Restatement (Third) of Foreign Relations Law of the United States* § 414 comment c (1987).

[13] A large number of statutes employ similar or identical "commerce" and "affecting commerce" language to that used in Title VII. *See, e.g.*, Consumer Product Safety Act, 15 U.S.C. § 2052(a)(12); Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 321(b); Noise Control Act of 1972, 42 U.S.C. § 4902(7); Radiation Control for Health and Safety Act of 1968, 42 U.S.C. § 263c(4); and Transportation Safety Act of 1974, 49 U.S.C. § 1802(1). The use of such language in these statutes does not evidence any affirmative intent by Congress to extend these statutes extraterritorially, and no court has held that any of these statutes so apply.

B. The Requisite Clear Expression Of Affirmative Intent Cannot Be Found In The Negative Inference From the Alien Exemption Provision

The EEOC secondarily argues that the Act's alien exemption provision would have no meaning unless read to mean that U.S. citizens outside any State are covered. While this negative inference analysis also was the centerpiece of the dissents, the panel and *en banc* majorities pointed out that this provision can and does have meaning simply by reading it consistently with this Court's decision in *Espinoza* v. *Farah Mfg. Co.*, 414 U.S. 86, 95 (1973). Pet. App. 4a, 36a. As this Court held in *Espinoza*, "Title VII was clearly intended to apply with respect to the employment of aliens inside any State." *Espinoza* v. *Farah Mfg. Co.*, 414 U.S. at 95.[14]

Furthermore, as the EEOC notes, aliens are included within the coverage of the Act because they are 'individuals" protected by the prohibitions against unfair employer practices in 42 U.S.C. § 2000e-2. EEOC Pet. 9-10 n.6. The definition of "employer" includes all employers engaged in an industry affecting commerce, and the definition of "commerce" refers to possessions of the United States. 42 U.S.C. §§ 2000e(b), (g). Thus, aliens

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[14] The EEOC attacks this reasoning as being "no plausible explanation" because "Congress could not have intended to employ an *exemption* to extend Title VII's coverage to that group." EEOC Pet. 9-10 n.6 (emphasis in original). Respondents agree that an exemption provision cannot properly *extend* coverage not otherwise clearly provided for in the Act. It is likely, however, that the alien exemption was intended to *confirm* coverage for aliens residing in the United States. The alien exemption provision first appeared in Representative Adam Clayton Powell's 1949 Fair Employment Practices bill at a time when aliens were exempted from certain domestic protective labor legislation and restricted in their employment opportunities within the United States. It was incorporated in the Civil Rights Act of 1964 virtually without comment. *See* Kirschner, *Extraterritorial Application of Title VII of the Civil Rights Act*, 34 Labor L.J. 394, 400 & n.26 (1983).

employed by employers in the possessions of the United States would be covered by Title VII but for the inclusion by Congress of the alien exemption, which provides that Title VII does not extend to the employment of aliens "outside any State." Since "State," as defined by the Act, covers certain territories but does not cover possessions, 42 U.S.C. §§ 2000e(i), aliens employed in the possessions of the United States are exempted from the coverage of Title VII by virtue of the alien exemption provision—a perfectly "plausible explanation" of why Congress included it in Title VII.[15]

Finally, a negative inference from an exemption provision is not a reliable or proper source of the clear and affirmative congressional intent required to rebut the presumption against extraterritorial application of a statute. In *Sandberg* v. *McDonald*, 248 U.S. 185 (1918), the Court held that Congress did not intend the Seaman's Act of 1915 to invalidate advances in wages where the contract and advance payment were made in a foreign country whose law permitted them. The Court reached that conclusion because Congress would not leave "such an important regulation to be gathered from implication." 248 U.S. at 195.

As this Court has stated, Congress knows how to provide expressly for extraterritorial application of a statute when it wants the statute to apply beyond the borders of the United States. *See Argentine Republic* v. *Amerada Hess Shipping Corp.*, 109 S.Ct. 683, 691 (1989) ("When it desires to do so, Congress knows how to place the high seas within the jurisdictional reach of a statute.")

[15] In 1948, this Court held that the term "possession" under the Fair Labor Standards Act included leased bases in foreign nations. *Vermilya-Brown Co.* v. *Connell*, 335 U.S. 377, 390 (1948). The congressional concern with exempting aliens employed within the possessions of the United States as a result of the *Vermilya-Brown* decision in 1948 is at least as likely a reason for inclusion of an alien exemption provision in Title VII as the EEOC's explanation. EEOC Pet. 11 n.7.

Not only does Title VII lack an explicit statement of jurisdiction over employers overseas, it is "curiously silent" on such matters as conflicts with foreign laws, venue for foreign violations, investigatory tools for overseas violations and application to foreign employers of U.S. citizens abroad. Pet. App. 5a. By contrast, statutes that by their explicit language do apply extraterritorially, such as the Age Discrimination in Employment Act of 1967 ("ADEA"), expressly deal with such matters.[16]

Furthermore, as pointed out by the *en banc* court, the extraterritorial application of Title VII necessarily would mean that foreign employers of U.S. citizens abroad would be covered as well as U.S. employers. Pet. App. 5a-6a. In contrast to the ADEA, there are no exemptions stated for foreign employers in the definition of "employer" in Title VII. Thus, if Title VII does apply extraterritorially, by its terms it must cover foreign employers. *Cf. Andrus* v. *Glover Constr. Co.*, 446 U.S. 608, 616-617 (1980). Indeed, the EEOC's own policy guidance also assumes that Title VII covers foreign employers:

> [T]he Act contains no exemption from coverage for foreign employers even though Congress wrote numerous exemptions in the original statute and its amendments. . . . it is necessary to construe § 702 as expressing a Congressional intent to extend the coverage of Title VII to American and some foreign employers.

[16] *See, e.g.*, 29 U.S.C. § 623(h)(2), which exempts "a foreign person not controlled by an American employer" from the ADEA's prohibitions against age discrimination; and 29 U.S.C. § 623(f)(1), which exempts practices dictated by the laws of the country in which the workplace is located. Congress also specifies whenever it intends that the coverage of a statute extend to U.S. citizens overseas. *See, e.g.*, the Comprehensive Anti-Apartheid Act of 1986, 22 U.S.C. § 5001 (defining "national of the United States"), the Export Administration Act of 1979, 50 U.S.C. app. § 2415(2) (defining "United States person") and the Logan Act, 18 U.S.C. § 953 ("Any citizen of the United States, wherever he may be . . .").

Policy Statement No. 88-15, EEOC Compl. Man. (CCH) ¶ 2187 (1989). Yet Congress would not have applied Title VII to foreign employers without doing so expressly, clearly and affirmatively.

Petitioners' arguments are an attempt to read into Title VII an intent of Congress that simply is not there. They and the dissenting opinions advance a host of policy reasons, better addressed to Congress, seeking to justify a retroactive expansion of Title VII's coverage. In contrast, consistent with this Court's precedents, the Fifth Circuit examined the statute as a whole and found the requisite clear intent lacking. Based on this Court's decisions requiring that an intent to apply a statute extraterritorially must be clearly and affirmatively expressed by Congress, the Fifth Circuit's decision is correct on the merits and should not be subjected to further review.

III. THE EXTRATERRITORIAL APPLICATION OF TITLE VII IS A POLICY MATTER FOR CONGRESS TO DECIDE

The application of Title VII to overseas workplaces would create conflicts with the laws of other countries and in the operations of multinational corporations that employ workforces composed of individuals from many nations. If Title VII were held applicable to employers of United States citizens overseas, multiple employment systems based on the citizenship of particular employees would be required within companies. In addition, foreign employers, to which the Act would apply, might well choose to forgo employing U.S. citizens at all in order to avoid such difficulties.

The total absence of any statutory guidance for resolving the conflicts that would arise necessarily would lead to increased litigation. Determining the applicability of Title VII on a case-by-case basis and attempting to rely "upon the judiciary to minimize conflicts of jurisdiction by exercising a jurisdictional rule of reason" in

individual cases," as the dissent suggests (Pet. App. 25a), would invite a proliferation of litigation on social and policy questions and increase friction with friendly sovereigns.[17]

Unlike the 1964 Congress that enacted Title VII, Congress in the 1984 ADEA amendment explicitly addressed the question of extraterritorial application and provided the "nuts-and-bolts" provisions to make it work.[18] The ADEA amendment was limited to employers controlled by U.S. corporations and even listed the factors to be applied in determining whether such control is present. 29 U.S.C. § 623(h). The amendment also contained an exemption for practices dictated by the laws of the country in which the workplace is located. 29 U.S.C. § 623(f)(1). In contrast, although Title VII if extended extraterritorially would reach even to foreign employers of U.S. citizens abroad, it contains no statutory language that even suggests guidance on such questions.

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[17] Indeed, a similar case-by-case balancing approach, at one time used by the National Labor Relations Board under the NLRA, was rejected by this Court in *McCulloch* v. *Sociedad Nacional de Marineros de Honduras*, 372 U.S. at 19, in favor of "the affirmative intention of the Congress clearly expressed." *Id.* at 22, quoting *Benz*, 353 U.S. at 147.

[18] The EEOC asserts that the 1984 amendment to the ADEA underlines a congressional determination to apply anti-discrimination legislation abroad and then argues that the Fifth Circuit's holding creates "an anomaly" that Congress never intended between the reach of Title VII and the ADEA. EEOC Pet. 12-13. As the EEOC concedes, however, the legislative history of the 1984 ADEA amendment is not "indicative of the intent of the 1964 Congress that enacted Title VII." *Id.* at 13 n.10. Furthermore, this "anomaly" is little more than an argument that Senator Grassley in 1983 incorrectly believed that Title VII applied to employers of U.S. citizens abroad in reliance on two district court opinions, presumably *Love* and *Bryant*, one of which stated that conclusion in *dicta* (*Love*) and the other of which was subsequently reversed on appeal (*Bryant*). *See* 129 Cong. Rec. 34,499 (1983) (remarks of Sen. Grassley).

The absence of such provisions in Title VII is of heightened importance because age is a culturally neutral factor while race, religion, sex and national origin are regarded quite differently in different countries. There are sensitive and sometimes vast cultural differences between this nation and other sovereign states, many of which already regulate such matters, and some of which provide greater protection than does the United States.[19] If Title VII had been intended to extend to workplaces overseas, Congress would have given greater consideration to conflicts with foreign laws and values, particularly in the context of multinational workforces.

Only Congress should decide whether particular U.S. laws should govern workplaces in foreign nations where U.S. citizens are employed. The legislative branch is empowered to make the fundamental policy decisions whether and to what extent to risk infringing upon matters governed by other sovereigns within their own borders who may disagree with the provisions of U.S. employment laws as being inappropriate for application to their own economic, social and labor law systems. Congress "alone has the facilities necessary to make

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[19] At least 48 nations have employment discrimination laws. *See En Banc* Brief of Amicus Rule of Law Committee at 16, *Boureslan* v. *Aramco*, 857 F.2d 1014 (5th Cir. 1990) (*en banc*) (No. 87-2206). Canada's employment discrimination law protects against discrimination on the basis of alcohol or drugs, pregnancy/childbirth, marital status, criminal conviction and other factors. *Id.* at n.18.

In Saudi Arabia, the Labor and Workmen Law of 1969 regulates virtually all employment within the borders of Saudi Arabia, including that of foreign companies. All aggrieved persons working in Saudi Arabia, regardless of citizenship, may vindicate their rights under the law before commissions that are empowered to render final and binding decisions in connection with labor disputes, including those pertaining to termination. *See* Appellee Aramco's Court of Appeals Record Excerpts at tab 9 (No. 87-2206). Similarly, aggrieved persons working in the United States may vindicate their rights pursuant to Title VII whether they are U.S. citizens or foreign nationals.

fairly such an important policy decision where the possibilities of international discord are so evident and retaliative action so certain." *Benz* v. *Compania Naviera Hidalgo, S.A.*, 353 U.S. at 147.

The Fifth Circuit properly declined to make the choices that are assigned to Congress. Pet. App. 41a ("It is not for this court to decide this policy issue for the legislative branch.") As it did after a number of circuits held that the ADEA did not apply extraterritorially, Congress may choose to review Title VII and determine whether to apply Title VII to employers of U.S. citizens overseas, and if so, to provide the explicit language and specific provisions that are necessary. The proper body to make those decisions, however, is the Congress and not the courts.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted,

Of Counsel:
JOHN D. ROADY
HUTCHESON & GRUNDY
3300 Citicorp Center
1200 Smith Street
Houston, Texas 77002

PAUL L. FRIEDMAN
(Counsel of Record)
THOMAS J. O'SULLIVAN
ANNE D. SMITH
WHITE & CASE
1747 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 872-0013
Attorneys for Respondents

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APPENDICES

APPENDIX A

As required by Rule 29.1, the parent and subsidiaries of Aramco and ASC are as follows:

Aramco is a Delaware corporation. Aramco has one subsidiary, Trans-Arabian Pipe Line Company. Aramco is owned by Transocean Chevron Company, Exxon Overseas Corporation, Mobil International Petroleum Corporation and Texaco International Trader, Inc. All of Aramco's assets, business and employees recently were transferred to Saudi Aramco.

ASC is a wholly owned subsidiary of the Saudi Arabian Oil Company (Saudi Aramco), which is a Saudi Arabian company that is wholly owned by the Government of Saudi Arabia. All of ASC's subsidiaries are wholly owned.

APPENDIX B

Relevant provisions of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2000e-17:

§ 2000e. Definitions

For the purposes of this subchapter— • • •

(b) The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or any department or agency of the District of Columbia subject by statute to procedures of the competitive service (as defined in section 2102 of Title 5), or (2) a bona fide private membership club (other than a labor organization) which is exempt from taxation under section 501(c) of Title 26, except that during the first year after March 24, 1972, persons having fewer than twenty-five employees (and their agents) shall not be considered employers.

• • • •

(f) The term "employee" means an individual employed by an employer, except that the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policy making level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil

service laws of a State government, governmental agency or political subdivision.

• • • •

(g) The term "commerce" means trade, traffic, commerce, transportation, transmission, or communication among the several States; or between a State and any place outside thereof; or within the District of Columbia, or a possession of the United States; or between points in the same State but through a point outside thereof.

• • • •

(h) The term "industry affecting commerce" means any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce and includes any activity or industry "affecting commerce" within the meaning of the Labor-Management Reporting and Disclosure Act of 1959, and further includes any governmental industry, business, or activity.

• • • •

(i) The term "State" includes a State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, the Canal Zone, and Outer Continental Shelf lands defined in the Outer Continental Shelf Lands Act.

• • • •

§ 2000e-1. Subchapter not applicable to employment of aliens outside State and individuals for performance of activities of religious corporations, associations, educational institutions, or societies

This subchapter shall not apply to an employer with respect to the employment of aliens outside any State, or to a religious corporation, association, edu-

cational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.

§ 2000e-2. Unlawful employment practices

Employer practices

(a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Relevant provisions of the Age Discrimination Act of 1967, 29 U.S.C. §§ 621-634:

§ 623. Prohibition of age discrimination

(f) Lawful practices; age an occupational qualification; other reasonable factors; laws of foreign workplace; seniority system; employee benefit plans; discharge or discipline for good cause

It shall not be unlawful for an employer, employment agency, or labor organization—

(1) to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age, or where such practices involve an employee in a workplace in a foreign country, and compliance with such subsections would cause such employer, or a corporation controlled by such employer, to violate the laws of the country in which such workplace is located;

• • • •

(h) Practices of foreign corporations controlled by American employers; foreign persons not controlled by American employers; factors determining control

(1) If an employer controls a corporation whose place of incorporation is in a foreign country, any practice by such corporation prohibited under this section shall be presumed to be such practice by such employer.

(2) The prohibitions of this section shall not apply where the employer is a foreign person not controlled by an American employer.

(3) For the purpose of this subsection the determination of whether an employer controls a corporation shall be based upon the—

(A) interrelation of operations,

(B) common management,

(C) centralized control of labor relations, and

(D) common ownership or financial control, of the employer and the corporation.

§ 630. Definitions

For the purposes of this chapter— • • •

(f) The term "employee" means an individual employed by any employer except that the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policymaking level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency, or political subdivision. The term "employee" includes any individual who is a citizen of the United States employed by an employer in a workplace in a foreign country.

• • • •

(3)

No. 89-1838

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In the Supreme Court of the United States

OCTOBER TERM, 1990

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
PETITIONER

v.

ARABIAN AMERICAN OIL COMPANY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

KENNETH W. STARR
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

BEST AVAILABLE COPY

TABLE OF AUTHORITIES

Cases: Page

Akgun v. *Boeing Co.*, No. C89-1319D (W.D. Wash. June 7, 1990) 1
Benz v. *Compania Naviera Hidalgo, S.A.*, 353 U.S. 138 (1957) 7
Bowles v. *Seminole Rock & Sand Co.*, 325 U.S. 410 (1945) 9
Espinoza v. *Farah Mfg. Co.*, 414 U.S. 86 (1973) 4
Foley Bros. v. *Filardo*, 336 U.S. 281 (1949) 3, 4
Ford Motor Credit Co. v. *Milhollin*, 444 U.S. 555 (1980) 9
INS v. *Stanisic*, 395 U.S. 62 (1969) 9
McCulloch v. *Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10 (1963) 7
Udall v. *Tallman*, 380 U.S. 1 (1965) 9
Vermilya-Brown Co. v. *Connell*, 335 U.S. 377 (1948) 4, 5

Statutes and regulations:

Act of Aug. 30, 1957, § 1, Pub. L. No. 85-231, 71 Stat. 514 5
Fair Labor Standards Act, 29 U.S.C. 213(f) 5
Labor-Management Relations Act of 1947, 29 U.S.C. 142(1) 7
Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. 402(c) 7
National Labor Relations Act, 29 U.S.C. 152(6)-(7) 7
Civil Rights Act of 1964, Tit. VII, 42 U.S.C. 2000e *et seq.*:
  42 U.S.C. 2000e(i) 4
  42 U.S.C. 2000e-1 ..... 1, 4
  42 U.S.C. 2000e-2 4
29 C.F.R. (1971):
  Section 1606.1 9
  Section 1606.1(c) 8

Miscellaneous: Page

110 Cong. Rec. 12,811 (1964) 6
H.R. Rep. No. 570, 88th Cong., 1st Sess. (1963) 5
H.R. Rep. No. 914, 88th Cong., 1st Sess. (1963) 6

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ARABIAN AMERICAN OIL COMPANY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

1. Since the filing of the petition, another court has determined that Title VII applies to discrimination abroad by American employers against American citizens. *Akgun* v. *Boeing Co.*, No. C89-1319D (W.D. Wash. June 7, 1990). Following substantially the same line of reasoning as the decisions cited in the petition (Pet. 14), the *Akgun* court concluded that the "most reasonable and compelling reading" of Title VII's alien exemption, 42 U.S.C. 2000e-1, was that "Congress intended Title VII to apply abroad (*i.e.*, outside any state) with respect to the employment of U.S. citizens (*i.e.*, non-aliens)." Slip op. 6. The court found additional support for this conclusion in the legislative history cited in the petition. *Id.* at 8-9; see Pet. 10-11 & n.7. Noting that "the emphasis of the parties" was "on whether [the court] should adopt the *Boureslan* holding," the *Akgun* court found it-

self "unpersuaded by the majority opinion in *Boureslan*." Slip op. 5.

The *Akgun* decision underscores the reasons why this case is deserving of further review even in the absence of a conflict among the circuits. The Fifth Circuit's decision stands alone, among decisions by four other courts and the administrative interpretations of the statute by the EEOC and the Department of Justice, in holding that Title VII provides no protection for American citizens abroad. The issue is recurrent. As *Akgun* reflects, the Fifth Circuit's reasoning is unpersuasive and thus unlikely to produce any consensus regarding Title VII's application to discrimination abroad—a straightforward question of statutory interpretation that has important ramifications for the careers of many Americans and the national policy against invidious employment discrimination. This Court's review is appropriate to resolve the uncertainty arising from the court of appeals' decision.

2. Respondents attempt to obfuscate the nature of our reliance on Title VII's jurisdictional language and the alien exemption, implying that these provisions should be examined separately to see whether either amounts to a "clear" or "affirmative" expression of extraterritorial intent. *E.g.*, Br. in Opp. 4, 9, 13, 16. Quite simply, our position is this: Title VII's general jurisdictional provisions, by their terms, reach discrimination abroad against American citizens by American employers. The alien exemption, by its terms, exempts aliens employed outside the United States. This combination of provisions is an entirely natural way of pursuing two objectives simultaneously: assuring that Americans will enjoy substantially the same protection from discrimination by American employers abroad that they enjoy in this country, while at the same time avoiding difficulties that could arise from attempts to apply American law to foreign nationals in foreign states. *Read together*, the two provisions also overcome the presumption against

the extraterritorial application of statutes. Whether or not the general jurisdictional language alone would satisfy the presumption, the exemption confirms that the jurisdictional provisions reach Americans employed by American corporations abroad; if they did not, the exemption would be superfluous. Nothing more is required to satisfy a presumption whose purpose is, after all, to provide a means whereby "unexpressed congressional intent may be ascertained." *Foley Bros.* v. *Filardo*, 336 U.S. 281, 285 (1949).

Respondents' contention that Title VII provides only a "negative inference" as opposed to a "clear" or "affirmative" statement of extraterritorial intention (*e.g.*, Br. in Opp. 7, 9, 12, 17) rests on a misconception of the inquiry that the presumption mandates. The presumption does not impose drafting requirements on Congress—compelling it to use a particular form in order to assure that a statute will apply abroad. Nor does it mandate a search in a statute for a single discrete provision that respondents might characterize as "affirmative" rather than "negative." Rather, it requires courts to examine the statute, aided by the customary tools of statutory interpretation, to determine whether Congress has expressed an intention to apply the requirements of the law abroad. In this case, we submit, the combination of Title VII's general provisions and an exemption that can be given effect only if the statute applies abroad satisfies that standard. Against that general background, we turn to some of the points raised by the brief in opposition.

a. Respondents suggest that the alien exemption could perform two functions consistent with their construction of the statute. Neither is plausible.

First, respondents assert that "[i]t is likely * * * that the alien exemption was intended to *confirm* coverage for aliens residing in the United States." Br. in Opp. 17 n.14. However, the provision of Title VII that protects resident aliens is clear on its face and requires no con-

firmation. See 42 U.S.C. 2000e-2 (prohibiting unlawful employment practices directed at "any individual"); *Espinoza* v. *Farah Mfg. Co.*, 414 U.S. 86, 95 (1973). Even if it were not, it is singularly unlikely that legislators concerned about ambiguity would choose so indirect a way of resolving it; the natural response to such a problem would be to draft a provision that would expressly include resident aliens, not one excluding non-resident aliens.

Second, respondents suggest that the exemption could have been part of a plan to cover American citizens but not aliens in "possessions" of the United States. Br. in Opp. 17-18 & n.15. This unprecedented suggestion encounters a host of problems. Most fundamentally, it is inconsistent with respondents' own view of the presumption against extraterritoriality. Since these possessions are located outside the States and territories of the United States (see 42 U.S.C. 2000e(i)), respondents' argument would entail an extraterritorial application of American law. See *Vermilya-Brown Co.* v. *Connell*, 335 U.S. 377, 381 (1948) (noting that application of Fair Labor Standards Act to Lend Lease bases involved regulation "outside the territorial jurisdiction of the United States"); *Foley Bros.* v. *Filardo*, 336 U.S. at 285 (explaining *Vermilya-Brown* as a case in which the presumption against extraterritorial application was satisfied). Respondents offer no explanation of how Title VII could satisfy the presumption against extraterritoriality as to such possessions but not as to any other territory "outside any State," 42 U.S.C. 2000e-1. Respondents' suggestion also contemplates that the Congress that enacted the statute (i) viewed Americans employed by private employers in American possessions on foreign soil to be more deserving of protection from invidious discrimination than Americans employed by the same employers on other foreign soil and (ii) chose to implement that implausible policy choice by means of an exemption for "the employment of aliens outside any State," as

opposed to a provision directly addressing American possessions.[1] There is not the slightest support—in the conditions to which Title VII was addressed or its legislative history—for the notion that the alien exemption was intended for that purpose. Finally, unless Congress enacted the alien exemption with the intention of simultaneously confirming coverage for resident aliens and excluding it for non-resident aliens in American possessions (an even more unlikely legislative contortion), this interpretation of the exemption is inconsistent with the other role that respondents propose for the same provision.

As we noted in the petition, and as every decision except for the one in this case has found, the alien exemption makes sense *only if* Title VII is intended to apply to American citizens employed by American employers "outside any State."

b. The alien exemption's legislative history confirms this view; a committee report indicates that the exemption's purpose is "to remove conflicts of law which might otherwise exist between the United States and a foreign nation in *the employment of aliens outside the United States* by an American enterprise." H.R. Rep. No. 570, 88th Cong., 1st Sess. 4 (1963) (emphasis added). The potential conflicts were removed by excluding coverage *of aliens* outside the United States—not by providing that the Act did not apply outside the United States. Respondents suggest that this committee report is not authoritative because it related to a bill that "contained specific language that referred to 'foreign commerce' and 'foreign nations'" that was deleted by the time the bill passed the Senate. Br. in Opp. 14-15 & nn.10-11. Accord-

[1] In 1957, Congress amended the Fair Labor Standards Act, the statute at issue in *Vermilya-Brown* v. *Connell*, *supra*, to specify the territory within which that statute would operate. See Act of Aug. 30, 1957, Pub. L. No. 85-231, § 1, 71 Stat. 514 (adding 29 U.S.C. 213(f)). Presumably, if Congress had intended to provide for special treatment of American possessions in Title VII, it would have followed the same direct approach.

ing to respondents, the deletion "evidence[s] a decision by Congress not to have the statute apply to employers operating overseas." *Id.* at 15.

Respondents mischaracterize the nature of the deletion and its implications. The Senate did not delete language focusing on "foreign commerce" or "foreign nations" from the House version of the bill that became Title VII. Rather, it deleted general legislative declarations that set forth the broad purposes of the statute and referred to foreign commerce only in passing.[2] The deletion did not amend the operative provisions of the statute, and it cannot fairly be read to express any view on the substance of the statute that was enacted.[3] In particular, it did not "evidence a decision by Congress not to have the statute apply to employers operating overseas" (Br. in Opp. 15)—unless the Senate also decided to restrict the statute's application to "commerce among the States" or, for that matter, to disavow "the national policy to protect the right of the individual to be free from [invidious] discrimination." See note 2, *supra*. Because the deletion had no effect on the alien exemption, it does not reduce the force of that provision's legislative history.

[2] In their entirety, the declarations deleted by the Senate provided (110 Cong. Rec. 12,811 (1964)):

> Sec. 701. (a) The Congress hereby declares that the opportunity for employment without discrimination of the types described in sections 704 and 705 [of H.R. 7152, 88th Cong., 1st Sess. (1963)] is a right of all persons within the jurisdiction of the United States, and that it is the national policy to protect the right of the individual to be free from such discrimination.
>
> (b) The Congress further declares that the succeeding provisions of this title are necessary for the following purposes:
>
> (1) To remove obstructions to the free flow of commerce among the States and with foreign nations.
>
> (2) To insure the complete and full enjoyment by all persons of the rights, privileges, and immunities secured and protected by the Constitution of the United States.

[3] The reasons why these declarations were deleted are unclear to us. It may be that, in view of the controversy over the constitutional footing of the statute, the Senate decided to omit provisions addressing that matter. See H.R. Rep. No. 914, 88th Cong., 1st Sess. 50-52 (1963) (additional views of Rep. Meader); *id.* at 88-94 (minority report); *id.* at 108-110 (separate minority views of Reps. Poff and Cramer).

c. Respondents also suggest (Br. in Opp. 14-15) that in drawing upon the jurisdictional provisions of the National Labor Relations Act, 29 U.S.C. 152(6)-(7), and the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. 402(c), which in turn refers to the Labor-Management Relations Act of 1947, 29 U.S.C. 142(1), Congress should be deemed to have limited Title VII's scope because of decisions holding that the NLRA and the LMRA do not apply to foreign seamen whose foreign-flag vessels stop at American ports. *Benz* v. *Compania Naviera Hidalgo, S.A.*, 353 U.S. 138 (1957); *McCulloch* v. *Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10 (1963). While it is true that Title VII's jurisdictional provisions were patterned after similar definitions in other labor statutes, it does not follow that this Court's decisions under those other statutes limit Title VII's reach—or that Congress intended that result.

In both *Benz* and *McCulloch*, the issue was whether American statutes expressed an intention to regulate labor relations between alien seamen and foreign shipowners whose ships called at American ports. In *Benz*, the Court concluded, "Our study of [the LMRA] leaves us convinced that Congress did not fashion it to resolve labor disputes *between nationals of other countries operating ships under foreign laws.*" 353 U.S. at 143 (emphasis added). Similarly, in *McCulloch*, the Court framed the "basic" question as "whether [the NLRA] as written was intended to have any application to *foreign registered vessels employing alien seamen.*" 372 U.S. at 19 (emphasis added). Adhering to the holding in *Benz*, the Court in *McCulloch* found that the NLRA failed to describe "the boundaries of the Act as including *foreign-flag vessels manned by alien crews.*" *Id.* at

20 (emphasis added). This case deals with the converse of the situation presented by *Benz* and *McCulloch*. The issue is whether Americans employed by American corporations abroad retain the protection of an American statute, not whether aliens employed by foreign employers gain the benefit of American law by virtue of brief stops in American territory. Thus, the Court's holdings in *Benz* and *McCulloch* are inapplicable. There is no reason to believe that Congress believed otherwise or attempted, by means of the use of jurisdictional language in Title VII similar to that of other statutes, to deprive Americans of protection from employment discrimination.

3. Respondents challenge our contention that both the Department of Justice and the EEOC have construed the statute to apply to employment discrimination by American corporations against American citizens abroad. Br. in Opp. 9-10 & n.7. In their view, an interpretative regulation promulgated by the Commission in 1970 limited Title VII to persons "domiciled or residing in the United States." Br. in Opp. 10 (quoting 29 C.F.R. 1606.1(c) (1971)). Thus, they contend, the interpretation conveyed by the EEOC's General Counsel to the Senate Foreign Relations Committee in 1975 "was contrary to the EEOC's own regulation that was then in force." Br. in Opp. 11. Respondents also suggest that the interpretation proffered to Congress by the Assistant Attorney General can be disregarded because its "purpose * * * was primarily to persuade Congress that Arab boycott legislation was not needed" and because it contradicted the EEOC's regulation. *Id.* at 10 n.7.

It is respondents (and not the officials who responded in good faith to inquiries from Congress) who have misread the EEOC's prior regulation. While the regulation stated that citizens and non-citizens within the United States were covered by Title VII, it did not say that Americans abroad were not. Nor did it purport to set out the full reach of Title VII. Rather, as a part of a

section entitled "Guidelines on discrimination because of national origin" (29 C.F.R. 1606.1 (1971)), the regulation constituted a portion of the explanation of the EEOC's position that discrimination based on citizenship had the effect of discriminating on the basis of national origin. Thus, the regulation did not speak to the question that the Commission's General Counsel and the Assistant Attorney General addressed in 1975. Respondents point to no occasion on which the Department of Justice or the EEOC has taken the position that Title VII is inapplicable to discrimination by American citizens against American employers abroad. Especially in light of the principle that an agency's interpretation of its own regulations is ordinarily controlling,[4] there is no reason to suppose that the Commission's General Counsel responded to Congress's inquiry regarding Title VII's scope with an unauthorized interpretation of the statute. Similarly, the Assistant Attorney General's testimony was supported by the Justice Department's responsibility for litigating claims under the provisions of Title VII—which parallel those at issue here—that prohibit discrimination by the federal government; the testimony cannot be dismissed as an unfounded attempt to influence legislation.

4. In the petition, we pointed out that the 1984 amendments to the ADEA were based on the assumption that Title VII applies to discrimination against Americans abroad and that the court of appeals' holding would create an anomalous distinction between employment discrimination based upon age as opposed to race, sex, religion, and national origin. Respondents reply with a cryptic suggestion that, unlike the classifications addressed in Title VII, "age is a culturally neutral factor"

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[4] *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945) (An administrative interpretation of a regulation is "of controlling weight unless it is plainly erroneous or inconsistent with the regulation."); *Udall* v. *Tallman*, 380 U.S. 1, 16-17 (1965); *INS* v. *Stanisic*, 395 U.S. 62, 72 (1969); *Ford Motor Credit Co.* v. *Milhollin*, 444 U.S. 555, 566 (1980).

and that the Senate sponsor of the 1984 amendments was simply incorrect in his understanding of Title VII. Br. in Opp. 21 n.18, 22. See Pet. 13 & n.10. We perceive no basis for the view that age is any more "culturally neutral" than other factors on which employment discrimination may be based—and, evidently, neither did the 1984 Congress. Further, the interpretation of Title VII propounded by the ADEA amendments' Senate sponsor was well founded; it was based upon all of the court decisions that had addressed the issue and testimony by the EEOC's Chairman.

5. We agree with respondents that the policy choices raised by Title VII's application to discrimination overseas are for Congress. See Br. in Opp. 20-23. However, we believe that the statute compels the conclusion that Congress has already spoken to those policy issues. The balance Congress has struck between the goal of equal employment opportunity for all Americans and the concerns raised by the extraterritorial application of Title VII should be respected.

For the reasons stated above and in the petition, certiorari should be granted.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

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OCTOBER TERM, 1990

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ALI BOURESLAN, PETITIONER

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BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

KENNETH W. STARR
Solicitor General

JOHN R. DUNNE
Assistant Attorney General

JOHN G. ROBERTS, JR.
Deputy Solicitor General

STEPHEN L. NIGHTINGALE
Assistant to the Solicitor General

Department of Justice
Washington, D.C. 20530
(202) 514-2217

DONALD R. LIVINGSTON
Acting General Counsel

GWENDOLYN YOUNG REAMS
Associate General Counsel

VINCENT J. BLACKWOOD
Assistant General Counsel

SAMUEL A. MARCOSSON
Attorney

Equal Employment Opportunity Commission
Washington, D.C. 20507

QUESTION PRESENTED

Whether Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, prohibits employment discrimination outside the United States by an American corporation against an American citizen.

PARTIES TO THE PROCEEDING

The Equal Employment Opportunity Commission, which intervened as an appellant in the court of appeals, is the petitioner in No. 89-1838. Ali Boureslan, the plaintiff-appellant below, is the petitioner in No. 89-1845. Arabian American Oil Company and Aramco Services Company, defendants-appellees below, are the respondents in both cases.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statutory provisions involved	2
Statement	2
Summary of argument	5
Argument:	
I. Title VII manifests a clear congressional intention to prohibit discrimination outside the United States by American employers against American citizens	8
A. By its terms, Title VII prohibits invidious employment discrimination against American citizens outside the United States	11
B. Title VII's exemption for aliens with respect to employment outside the United States clearly manifests an intention to protect American citizens with respect to employment outside the United States	12
C. Other provisions of Title VII are consistent with its application to discrimination by American employers against American citizens abroad	18
D. The EEOC, the agency charged with administrative enforcement of Title VII, has interpreted the statute to apply to discrimination against Americans abroad	22
II. Concern for potential conflicts with the laws of other nations does not warrant limiting Title VII to discrimination within the United States	24

	Page
A. The alien exemption represents Congress's solution to potential conflicts of laws	25
B. Properly applied, Title VII does not create a serious potential for conflicts with international norms or the laws of foreign states	25
C. Title VII's treatment of conflicts with state law provides no basis for questioning the extraterritorial application of the statute	29
D. The 1984 amendments to the ADEA do not justify a distinction between age discrimination and discrimination based upon race, sex, national origin, or religion	31
Conclusion	32

TABLE OF AUTHORITIES

Cases:

Akgun v. *Boeing Co.*, No. C89-1319D (W.D. Wash. June 7, 1990)	14
American Banana Co. v. *United Fruit Co.*, 213 U.S. 347 (1909)	9
Andrus v. *Glover Constr. Co.*, 446 U.S. 608 (1980)	13
Argentine Republic v. *Amerada Hess Shipping Co.*, 109 S. Ct 683 (1989)	9
Arrocha v. *Panama Canal Comm'n*, 609 F. Supp. 231 (E.D.N.Y. 1985)	19
Atascadero State Hosp. v. *Scanlon*, 473 U.S. 234 (1985)	13
Bainbridge v. *Merchants & Miners Transp. Co.*, 287 U.S. 278 (1932)	19
Benz v. *Compania Naviera Hidalgo, S.A.*, 353 U.S. 138 (1958)	18, 24, 25
Blackmer v. *United States*, 284 U.S. 421 (1932)	9, 26

Cases – Continued:

	Page
Branch v. *FTC*, 141 F.2d 31 (7th Cir. 1944)	12
Brunette Machine Works Ltd. v. *Kockum Indus., Inc.*, 406 U.S. 706 (1972)	19
Bryant v. *International Schools Services, Inc.*, 502 F. Supp. 472 (D.N.J. 1980), rev'd, 675 F.2d 562 (3d Cir. 1982)	14
Cleary v. *United States Lines, Inc.*, 728 F.2d 607 (3d Cir. 1984)	31
CFTC v. *Nahas*, 738 F.2d 487 (D.C. Cir. 1984)	20
Cole v. *Secretary of the Army*, EEOC Dec. No. 05890142 (Aug. 23, 1989)	23
Continental Ore Co. v. *Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962)	9
Cunard S.S. Co. v. *Mellon*, 262 U.S. 100 (1923)	18
DeYoreo v. *Bell Helicopter Textron, Inc.*, 785 F.2d 1282 (5th Cir. 1986)	31
EEOC v. *Commercial Office Products Co.*, 486 U.S. 107 (1988)	23
EEOC v. *Pacific Press Publishing Ass'n*, 676 F.2d 1272 (9th Cir. 1982)	14
EEOC Dec. No. 85-10, Empl. Prac. Dec. (CCH) ¶ 6851 (July 16, 1985)	27
EEOC Dec. No. 85-16, Empl. Prac. Dec. (CCH) ¶ 6856 (Sept. 16, 1985)	23
Espinoza v. *Farah Mfg. Co.*, 414 U.S. 86 (1973)	3, 14
Foley Bros., Inc. v. *Filardo*, 336 U.S. 281 (1949)	3, 9, 10, 13, 15, 17, 18, 24
FTC v. *Campagnie de Saint-Gobain-Pont-a-Mousson*, 636 F.2d 1300 (D.C. Cir. 1980)	21
Hedges v. *Department of Defense*, EEOC Dec. No. 05900454 (June 1, 1990)	23
Kern v. *Dynaelectron Corp.*, 577 F. Supp. 1196 (N.D. Tex. 1983), aff'd, 746 F.2d 810 (5th Cir. 1984)	27

Cases – Continued: Page

Lauritzen v. *Larsen*, 345 U.S. 571 (1953) 28, 29
Lopez v. *Pan Am World Services, Inc.*, 813 F.2d 1118 (11th Cir. 1987) 31
Love v. *Pullman Co.*, 13 Fair Empl. Prac. Cas. (BNA) 423 (D. Colo. July 21, 1976); aff'd, 569 F.2d 1074 (10th Cir. 1978) 14
McClure v. Salvation Army, 460 F.2d 553 (5th Cir.), cert. denied, 409 U.S. 896 (1972) 14
McCulloch v. *Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10 (1963) 9, 18, 24, 25, 27, 29
Murray v. *The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804) 28, 29
New York Central R.R. v. *Chisholm*, 268 U.S. 29 (1925) 9
Patterson v. *Bark Eudora*, 190 U.S. 169 (1903) 9, 10
Pennsylvania v. *Union Gas Co.*, 109 S. Ct. 2273 (1990) 13
Pfeiffer v. *William Wrigley Jr. Co.*, 755 F.2d 554 (7th Cir. 1985) 31
Ralis v. *RFE/RL, Inc.*, 770 F.2d 1121 (D.C. Cir. 1985) 31
Romero v. *International Terminal Operating Co.*, 358 U.S. 354 (1959) 28
Sandberg v. *McDonald*, 248 U.S. 185 (1918) 9
Schoenbaum v. *Firstbrook*, 405 F.2d 200, modified, 405 F.2d 215 (2d Cir. 1968), cert. denied, 395 U.S. 906 (1969) 9
Seville v. *Martin Marietta Corp.*, 638 F. Supp. 590 (D. Md. 1986) 14
Skiriotes v. *Florida*, 313 U.S. 69 (1941) 9, 26
Societe Nationale Industrielle Aerospatiale v. *United States District Court*, 482 U.S. 522 (1987) 21
Steele v. *Bulova Watch Co.*, 344 U.S. 280 (1952) .. 9, 10, 12, 24

Cases – Continued: Page

Stewart v. *Pacific Steam Navigation Co.*, 3 F.2d 329 (S.D.N.Y. 1924) 19
Sumitomo Shoji America, Inc. v. *Avagliano*, 457 U.S. 176 (1982) 26
Tamari v. *Bache & Co. (Lebanon) S.A.L.*, 730 F.2d 1103 (7th Cir.), cert. denied, 469 U.S. 871 (1984) 9
Thomas v. *Brown & Root, Inc.*, 745 F.2d 279 (4th Cir. 1984) 31
United States v. *Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945) 28, 29
United States v. *Bowman*, 260 U.S. 94 (1922) 9
United States v. *Flores*, 289 U.S. 137 (1933) 9
United States v. *Palmer*, 16 U.S. (3 Wheat.) 610 (1818) 28
United States v. *Rodgers*, 150 U.S. 249 (1893) 18
Vermilya-Brown Co. v. *Connell*, 335 U.S. 377 (1948) 9, 26
Weinberger v. *Rossi*, 456 U.S. 25 (1982) 29
Yellow Freight System, Inc. v. *Donnelly*, 110 S. Ct. 1566 (1990) 19
Zahourek v. *Arthur Young & Co.*, 750 F.2d 827 (10th Cir. 1984) 31

Constitution, statutes and rule:

U.S. Const:
Amend. XI 13
Act of Sept. 28, 1971, Pub. L. No. 92-129, Tit. I, § 106, 85 Stat. 355 31
Age Discrimination in Employment Act, 29 U.S.C. 630(f) 4
Civil Rights Act of 1964, Pub. L. No. 88-352, Tit. VII, 78 Stat. 253, 42 U.S.C. 2000e *et seq.* 2
§ 701(b), 42 U.S.C. 2000e(b) 11
§ 701(g), 42 U.S.C. 2000e(g) 11

Statutes and rule – Continued: Page

§ 701(h), 42 U.S.C. 2000e(h) 11
§ 702, 42 U.S.C. 2000e-1 (78 Stat. 255) 3, 6, 12
§ 703, 42 U.S.C. 2000e-2 ..... 11, 14, 27
§ 703(a), 42 U.S.C. 2000e-2(a) 11
§ 704, 42 U.S.C. 2000e-3 11
§ 706(a), 42 U.S.C. 2000e-5(a) 21
§ 706(b), 42 U.S.C. 2000e-5(b) 21
§ 706(b)-(d), 42 U.S.C. 2000e-5(b) to 2000e-5(d) 30
§ 706(f), 42 U.S.C. 2000e-5(f) 21
§ 706(f)(1), 42 U.S.C. 2000e-5(f)(1) 3
§ 706(f)(3), 42 U.S.C. 2000e-5(f)(3) 18
§ 708, 42 U.S.C. 2000e-7 30
§ 709, 42 U.S.C. 2000e-8 21
§ 709(b), 42 U.S.C. 2000e-8(b) 30
§ 710, 42 U.S.C. 2000e-9 ..... 20, 22
§ 710(a), 42 U.S.C. 2000e-9(a) (78 Stat. 264) .. 20
§ 717, 42 U.S.C. 2000e-16 23
Outer Continental Shelf Lands Act, 43 U.S.C. 1331 *et seq.* 8
15 U.S.C. 78s(b) 22
28 U.S.C. 1783 21
29 U.S.C. 161(1) 20, 22
46 U.S.C. 688 19
50 U.S.C. App. 2407 32
Fed. R. Civ. P. 45 21

Miscellaneous:

Age Discrimination and Overseas Americans, 1983: Hearing Before the Subcomm. on Aging of the Senate Comm. on Labor and Human Resources, 98th Cong., 1st Sess. (1983) 23, 31

Miscellaneous – Continued: Page

Civil Rights: Hearings Before Subcomm. No. 5 of the House Comm. on the Judiciary on Miscellaneous Proposals Regarding the Civil Rights of Persons Within the Jurisdiction of the United States, 88th Cong., 1st Sess. (1963) 16
129 Cong. Rec. 34,499 (1983) 31
Discriminatory Arab Pressure on U.S. Business: Hearings Before the Subcomm. on International Trade and Commerce of the House Comm. on International Relations, 94th Cong., 1st Sess. (1975) 24
Discriminatory Overseas Assignment Policies of Federal Agencies: Hearings Before a Subcomm. of the House Comm. on Government Operations, 94th Cong. 1st & 2d Sess. (1975-1976) 24
Foreign Investment and Arab Boycott Legislation: Hearings Before the Subcomm. on International Finance of the Senate Comm. on Banking, Housing and Urban Affairs, 94th Cong., 1st Sess. (1975) 24
H.R. 4453, 81st Cong., 1st Sess. (1949) 17, 18
H.R. 405, 88th Cong., 1st Sess. (1963) 16, 29
H.R. 7152, 88th Cong., 1st Sess. (1963) 16
H.R. Rep. No. 570, 88th Cong., 1st Sess. (1963) .. 16, 25
H.R. Rep. No. 914, 88th Cong., 1st Sess. (1963) .. 16
Note, *Equal Employment Opportunity for Americans Abroad*, 62 N.Y.U. L. Rev. 1288 (1987) ... 26
Policy Statement No. N-915.033, EEOC Compl. Man. (BNA), at 605:0055 (Sept. 2, 1988) 23, 28, 29
Restatement (Third) of the Foreign Relations Law of the United States (1986) 26, 27

Miscellaneous—Continued: Page

S. 1937, 88th Cong., 1st Sess. (1964) 16

S. Rep. No. 867, 88th Cong., 2d Sess. (1964) 16

Steinhardt, *The Role of International Law As a Canon of Domestic Statutory Construction*, 43 Vand. L. Rev. 1103 (1990) 29

In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 89-1838

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, PETITIONER

v.

ARABIAN AMERICAN OIL CO., ET AL.

No. 89-1845

ALI BOURESLAN, PETITIONER

v.

ARABIAN AMERICAN OIL CO., ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

OPINIONS BELOW

The panel and en banc opinions of the court of appeals (Pet. App. 1a-76a)[1] are reported, respectively, at 857 F.2d 1014 and 892 F.2d 1271. The opinion of the district court (Pet. App. 77a-82a) is reported at 653 F. Supp. 629.

JURISDICTION

The judgment of the court of appeals upon rehearing en banc was entered on February 2, 1990. On April 24, 1990, Justice

[1] "Pet. App." refers to the appendix to the petition in No. 89-1838.

White extended the time for filing a petition for a writ of certiorari to and including May 23, 1990. The petitions for writs of certiorari were filed on May 23, 1990, and were granted on October 1, 1990. This Court has jurisdiction under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, are set forth at Pet. App. 86a-88a.

STATEMENT

1. Ali Boureslan, the plaintiff in this Title VII action, is a naturalized American citizen. The defendants are two Delaware corporations, Arabian American Oil Company (Aramco) and Aramco Services Company (ASC). During the period relevant to this case, Aramco explored for, produced, and refined oil and gas in Saudi Arabia. All of Aramco's shares were owned by Texaco, Exxon, Mobil, and Chevron, or their subsidiaries. Aramco's principal place of business was Dhahran, Saudi Arabia, but it was licensed to do business in Texas. ASC was a wholly owned subsidiary of Aramco; its principal place of business was Houston, Texas. J.A. 21, 24, 41; see Br. in Opp. App. 1a.

In 1979, Boureslan was hired by ASC to work as an engineer in Houston. A year later, Boureslan's request for a transfer to Aramco was granted, and he relocated to Saudi Arabia. In that country, Boureslan alleges, his supervisor systematically mistreated him because of his national origin, religion, and race, and respondents sought to create a record that would justify his termination. On June 16, 1984, Boureslan was discharged. His complaint alleges that the stated grounds for the termination were pretextual and that he was actually discharged because of his national origin, race, and religion. J.A. 7-10, 31-36.

2. After filing a charge of discrimination against Aramco with the EEOC and receiving a right to sue letter, Boureslan commenced this action against Aramco and ASC. His amended

complaint seeks relief under Title VII and also asserts pendent state law claims. J.A. 9-10. Aramco moved to dismiss the complaint for lack of subject matter jurisdiction, arguing that Title VII does not apply to discrimination outside the United States. J.A. 11-12. The district court agreed with that contention and dismissed the Title VII claims against both defendants. Pet. App. 77a-82a. The court also dismissed Boureslan's state law claims for lack of pendent jurisdiction and entered final judgment in favor of both Aramco and ASC. See *id.* at 82a; J.A. 44.

3. A divided panel of the court of appeals affirmed. Pet. App. 28a-82a. The court then granted rehearing en banc; upon rehearing, the court affirmed the district court's judgment by a 9-5 vote. *Id.* at 1a-27a.[2]

a. The en banc majority held that Title VII does not apply to discrimination outside the United States. In reaching that conclusion, it relied on the "canon of construction * * * that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States." Pet. App. 3a (quoting *Foley Bros. Inc.* v. *Filardo*, 336 U.S. 281, 285 (1949)). Title VII, the majority concluded, "does not reflect the necessary clear expression of congressional intent to extend its reach beyond our borders." Pet. App. 7a.

The majority dismissed the contention that the statute's "alien exemption"—which provides that Title VII "shall not apply to an employer with respect to employment of aliens outside any State," 42 U.S.C. 2000e-1—demonstrates that Title VII was designed to apply to discrimination against American citizens outside the United States. Citing *Espinoza* v. *Farah Mfg. Co.*, 414 U.S. 86, 95 (1973), the majority ruled that the alien exemption reflects "a congressional intent to provide Title VII coverage to

[2] In the court of appeals, the EEOC participated as an amicus curiae before the panel. After entry of the panel's decision, the Commission was granted leave to intervene for the purpose of seeking further review and participated as a party in the rehearing en banc. Pet. App. 85a. See 42 U.S.C. 2000e-5(f)(1) (authorizing court, in its discretion, to permit the Commission to intervene in a civil action upon the Commission's certification that the case is of general public importance).

aliens employed *within* the United States." Pet. App. 4a. Thus, it reasoned, the provision would remain a "meaningful and useful part of the Act" even if Title VII were interpreted not to apply to discriminatory conduct abroad. *Ibid.*

The majority found additional support for its interpretation in what it characterized as the "domestic focus" of the Act and in Title VII's "repeated references" to the "United States", "states" and "state proceedings." Pet. App. 5a. Because Title VII "accommodate[s] state employment discrimination proceedings," the majority continued, "[i]f Congress had intended the Act to apply in foreign countries," it would "have been even more careful to address conflicts with foreign discrimination laws." *Ibid.* The majority also found the Act to be "curiously silent" on issues raised by extraterritorial application of Title VII, saying that Title VII "fails to address venue problems that arise with foreign violations" and that the EEOC's "investigatory powers are limited to evidence obtained in the United States and its territories." *Ibid.*

If the Act were applied extraterritorially, the majority continued, its plain language would reach foreign employers of American citizens. The majority expressed doubt "that Congress ever intended to impose Title VII on a foreign employer who had the grace to employ an American citizen in its own country." Pet. App. 6a. Finally, the court contrasted Title VII with other statutes having undoubted extraterritorial effect—in particular, the Age Discrimination in Employment Act, 29 U.S.C. 630(f). In those other statutes, the majority observed, "Congress demonstrated * * * its awareness of the need to make a clear statement of extraterritorial application, address the concerns of conflicting foreign law, and provide the usual nuts-and-bolts provisions for enforcing those rights." *Ibid.*

b. Five members of the court dissented. The dissenting opinion concluded that "a fair and reasonable reading" of Title VII "compels the conclusion that Congress did, in fact, intend Title VII's broad remedial goals to encompass, and eradicate, an American employer's discriminatory employment practices against a United States citizen, even if the acts constituting such discrimination were carried out on foreign soil." Pet. App. 7a.

The alien exemption, the dissent explained, provides a clear expression of Congress's intent to apply the statute extraterritorially; "[i]f Congress had not envisioned an extraterritorial application of Title VII, a specific provision exempting only aliens from such coverage would not have been needed." *Id.* at 9a. The dissent found further support for its interpretation of Title VII in the alien exemption's legislative history and in the EEOC's interpretation of the statute. *Id.* at 12a-16a & nn.3-7.

SUMMARY OF ARGUMENT

Like Ali Boureslan, many Americans spend a portion of their careers working outside the United States for American employers. Foreign assignments provide employees with valuable experience and are essential for advancement in many firms. The question presented by this case is whether Title VII provides Americans with protection from discrimination on the basis of race, sex, national origin, and religion while they are employed by American employers abroad.

I. There is no doubt that Congress has constitutional authority to prohibit such discrimination. In determining whether Congress has exercised that authority here, it is appropriate to refer to the canon of construction that, unless a contrary intent appears, legislation is interpreted to apply only within the territorial limits of the United States. Title VII satisfies the requirement imposed by this presumption; the language of the statute clearly manifests Congress's intention to prohibit employment discrimination abroad by American employers against American citizens.

A. By its terms, Title VII reaches discrimination against Americans employed abroad. The Act prohibits discriminatory employment practices by "an employer"—a defined term including all firms that employ a specified number of employees and are engaged in an industry affecting commerce. The statutory definition provides no exclusion for employers conducting operations abroad, and the term "commerce" is defined to include foreign commerce. Accordingly, American corpora-

tions that employ American citizens abroad are among the employers subject to the Act.

B. Section 702 of the Act, 42 U.S.C. 2000e-1, provides that Title VII does not apply to "the employment of aliens outside any State." This exemption demonstrates that Congress intended to protect American citizens from employment discrimination abroad. Congress could not rationally have enacted an exemption for aliens (but not citizens) with respect to employment abroad while at the same time believing that Title VII could not apply extraterritorially in the first place. The court of appeals' surmise that Congress enacted the alien exemption in order to confer coverage on aliens employed within the United States is untenable. Indeed, the legislative history of the alien exemption confirms that its purpose was to limit the potential for conflicts with foreign law by withdrawing coverage from aliens abroad.

C. No provision of Title VII is inconsistent with its application to the employment of American citizens by American employers abroad. Contrary to the court of appeals' suggestion, Title VII does not create a venue gap for cases arising from discrimination abroad. And even if such a gap existed, it would reflect at most a decision to limit plaintiffs' choice of forum, not an intention to withdraw all protection from Americans employed abroad. Similarly, the statute's limitation on the scope of the EEOC's subpoena power does not suggest a limit on the statute's substantive provisions. The remainder of the EEOC's authority and the rights conferred on private plaintiffs embody no geographical limitation. As other statutes containing virtually identical subpoena provisions reflect, there is no necessary relationship between an agency's subpoena power and the scope of the statute it administers.

D. The EEOC, the agency charged with principal responsibility for administering Title VII, has interpreted the statute to apply extraterritorially. The Justice Department, which also has responsibilities in this area, has reached the same conclusion. These consistent constructions of the statute by the responsible

agencies confirm that Congress's intent was to apply Title VII to Americans employed by American employers abroad.

II. Concern for potential conflicts between Title VII and the laws of foreign states, on which the court of appeals placed great emphasis, does not justify restricting the statute to discrimination within the United States.

A. Congress has spoken to the possibility that Title VII may conflict with foreign law. The exemption for the employment of aliens outside the United States embodies the balance that Congress struck between the goals of eradicating employment discrimination and avoiding conflicts with foreign laws. The courts are not at liberty to restrike that balance.

B. Applied to discrimination by American corporations against American citizens, Title VII does not raise a serious prospect of irreconcilable conflicts with foreign laws. International law recognizes a state's right generally to prescribe legal rules for its nationals outside the state's boundaries. Title VII provides potential defenses to employers that are compelled by the law of the territorial sovereign to engage in conduct that would otherwise be prohibited by Title VII. Application of Title VII to cases such as this does not infringe upon the sovereignty of foreign states.

C. In providing for limited deference to state fair employment proceedings but not to foreign procedures, Title VII does not suggest that Congress intended to limit Title VII to discrimination within the United States. Congress's decision not to require reference of charges of discrimination to unfamiliar foreign proceedings scarcely suggests that it turned a blind eye to employment discrimination by American employers against American citizens abroad. Indeed, because Title VII supersedes all inconsistent state law, it is even less tolerant of conflicts with state law than it is of conflicts with foreign law. The statutory provisions accommodating state fair employment laws provide no basis for doubt as to Congress's intention to prohibit discrimination abroad.

D. In 1984, Congress amended the Age Discrimination in Employment Act to make clear its intention to prohibit age discrimination against Americans employed abroad. Contrary

to the court of appeals' suggestion, those amendments do not reflect an intention to distinguish between age discrimination and discrimination based on race, sex, national origin, or religion. Indeed, it would be anomalous to construe Title VII to provide Americans abroad with less protection from discrimination based on race, sex, national origin, or religion than from discrimination based on age. In fact, the legislative history of the ADEA amendments reflects that Congress believed that it was bringing the ADEA into line with Title VII and providing Americans working abroad with substantially the same protection from all forms of discrimination. Construing Title VII to be inapplicable abroad would resurrect (in reverse) the anomaly that the 1984 Congress acted to eliminate.

ARGUMENT

I. TITLE VII MANIFESTS A CLEAR CONGRESSIONAL INTENTION TO PROHIBIT DISCRIMINATION OUTSIDE THE UNITED STATES BY AMERICAN EMPLOYERS AGAINST AMERICAN CITIZENS

The issue in this case—whether Title VII protects American citizens against invidious employment discrimination by American corporations outside of the United States[3]—is exclusively one of statutory interpretation. Congress's power to legislate under the Commerce Clause, the primary source of constitutional authority for Title VII, is not confined to the territorial limits of the United States. As long as it acts within its enumerated powers, Congress can "regulate the actions of our citizens outside the territorial jurisdiction of the United States

[3] For purposes of Title VII, "the term 'State' includes a State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, the Canal Zone, and Outer Continental Shelf lands defined in the Outer Continental Shelf Lands Act [43 U.S.C. 1331 *et seq.*]." This brief's references to the "United States" encompass all territory within the confines of these "States."

whether or not the act punished occurred within the territory of a foreign nation." *Vermilya-Brown Co.* v. *Connell*, 335 U.S. 377, 381 (1948).[4]

In determining whether Congress has exercised its authority to regulate extraterritorially, this Court has employed a canon of construction "that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States." *Foley Bros., Inc.* v. *Filardo*, 336 U.S. 281, 285 (1949).[5] That canon "is based on the assumption that Congress is primarily concerned with domestic conditions" (*ibid.*); it also serves to protect against needless conflicts between our laws and those of other states, cf. *McCulloch* v. *Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 21-22 (1963). The ultimate issue, however, remains one of legislative intent.

[4] Accord *Blackmer* v. *United States*, 284 U.S. 421, 437 (1932); *Patterson* v. *Bark Eudora*, 190 U.S. 169, 178-179 (1903); *Skiriotes* v. *Florida*, 313 U.S. 69, 73 (1941); *Foley Bros., Inc.* v. *Filardo*, 336 U.S. 281, 284-285 (1949); *Steele* v. *Bulova Watch Co.*, 344 U.S. 280, 282, 285-286 (1952); *McCulloch* v. *Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 17 (1963).

[5] See also *American Banana Co.* v. *United Fruit Co.*, 213 U.S. 347, 357 (1909); *Sandberg* v. *McDonald*, 248 U.S. 185, 195 (1918); *United States* v. *Bowman*, 260 U.S. 94, 98 (1922); *New York Central R.R.* v. *Chisholm*, 268 U.S. 29, 31-32 (1925); *Blackmer* v. *United States*, 284 U.S. 421, 437 (1932); *United States* v. *Flores*, 289 U.S. 137, 155 (1933); *Steele* v. *Bulova Watch Co.*, 344 U.S. 280, 285 (1952); *Argentine Republic* v. *Amerada Hess Shipping Co.*, 109 S. Ct. 683, 691 (1989). The Court has retreated somewhat from the strict concept of territoriality advanced in *American Banana*. See *Steele* v. *Bulova Watch Co.*, 344 U.S. at 288; *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690, 704 (1962).

In other contexts, the Court has indicated that a different form of analysis may apply. See *United States* v. *Bowman*, 260 U.S. at 98 (presumption against extraterritoriality is not applicable to statutes designed to protect the United States government from fraud, because those statutes "are not logically dependent on their locality for the Government's jurisdiction"). See also *Tamari* v. *Bache & Co. (Lebanon) S.A.L.*, 730 F.2d 1103, 1107 n.11 (7th Cir.), cert. denied, 469 U.S. 871 (1984); *Schoenbaum* v. *Firstbrook*, 405 F.2d 200, 206 (2d Cir.), modified on other grounds, 405 F.2d 215 (1968), cert. denied, 395 U.S. 906 (1969). In this case, the Court need not determine the outer perimeter of the presumption against extraterritoriality or the scope of any exceptions to the presumption that may exist.

To rebut the presumption against extraterritoriality, Congress need not express its intent to regulate outside the United States in any particular way. At the most obvious level, a statute may explicitly be made applicable to foreign parties. See *Patterson* v. *Bark Eudora*, 190 U.S. 169, 173 (1903). So too, broad jurisdictional language suffices to sustain extraterritorial applications of federal statutes that prevent evasion of "the thrust of the laws of the United States in a privileged sanctuary beyond our borders." *Steele* v. *Bulova Watch Co.*, 344 U.S. 280, 287 (1952). Other possibilities exist as well. In determining whether a statute reaches conduct abroad, courts may appropriately consult all materials customarily employed in statutory interpretation. See *Foley Bros.*, 336 U.S. at 285-291 (referring to the language of the statute at issue, its legislative history and "scheme", and administrative interpretations).

Interpreted in accordance with these principles, Title VII applies to discrimination outside the United States by an American employer against an American citizen. On its face, the statute prohibits discrimination by an employer engaged in an industry affecting interstate or foreign commerce, without regard to where the discrimination occurs. Understanding that the statute would apply to discrimination beyond the Nation's borders, Congress added an exemption withdrawing protection from aliens with respect to employment outside the United States. Congress must have understood that—were it not for the express exemption—Title VII *would* apply to aliens employed by American employers outside the United States. The exemption powerfully demonstrates that Congress intended Title VII to apply to the employment of *American citizens* outside this country. Nothing in Title VII supports a different interpretation. Finally, both the EEOC and the Justice Department, the agencies charged by Congress with enforcing Title VII, have consistently construed Title VII to apply to discrimination against American citizens abroad.

A. By Its Terms, Title VII Prohibits Invidious Employment Discrimination Against American Citizens Outside the United States

Title VII prohibits various discriminatory employment practices. 42 U.S.C. 2000e-2, 2000e-3. It is an "unlawful employment practice" for "an employer" (42 U.S.C. 2000e-2(a))

> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

In general, the applicability of this provision to alleged employment discrimination is dependent upon whether the employer satisfies the statutory definition of "an employer," 42 U.S.C. 2000e(b). An employer is subject to Title VII if it has employed 15 or more employees for a specified period and is "engaged in an industry affecting commerce." *Ibid.* An industry affecting commerce is "any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce and includes any activity or industry 'affecting commerce' within the meaning of the Labor-Management Reporting and Disclosure Act of 1959 [29 U.S.C. 401 *et seq.*]." 42 U.S.C. 2000e(h). Commerce, in turn, is defined as "trade, traffic, commerce, transportation, transmission, or communication among the several States; or between a State and any place outside thereof; or within the District of Columbia, or a possession of the United States; or between points in the same State but through a point outside thereof." 42 U.S.C. 2000e(g).[6]

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[6] Respondents have not contended that they lack the requisite number of employees or are not engaged in "an industry affecting commerce".

By their terms, these provisions reach employment discrimination occurring outside the United States. The statute's prohibition on "unlawful employment practices" is not limited to discriminatory practices occurring at any particular place, and the definition of employer includes both interstate and foreign commerce. Nothing in the statute makes the protection available to American citizens who are "individual[s]," "employees," or "applicants for employment" dependent on where they may be located when they are victimized by discrimination. In this respect, Title VII's jurisdictional provisions are similar to the "broad jurisdictional grant in the Lanham Act" upon which this Court relied in holding the trademark statute applicable to conduct outside this country. *Steele* v. *Bulova Watch Co.*, 344 U.S. at 286. See also *Branch* v. *FTC*, 141 F.2d 31, 34-35 (7th Cir. 1944).

B. Title VII's Exemption for Aliens With Respect to Employment Outside the United States Clearly Manifests An Intention to Protect American Citizens With Respect to Employment Outside the United States

1. In determining whether Title VII applies to discrimination by U.S. employers outside the United States, it is unnecessary to rely exclusively on the statute's broad jurisdictional provisions, for the "alien exemption" provision powerfully demonstrates Congress's intent to apply Title VII extraterritorially. That exemption is found in Section 702 of Title VII, 42 U.S.C. 2000e-1, which provides that the statute "shall not apply to an employer with respect to the employment of aliens outside any State." Against the background of Title VII's jurisdictional provisions, the thrust of this exemption is unmistakable. Congress understood that Title VII would apply to discrimination outside the United States, but chose not to confer protection on aliens outside this country. Accordingly, it fashioned an exemption for that group, limiting the statute's extraterritorial application to the employment of American citizens outside any State.

No other plausible explanation of the alien exemption exists. If Congress believed that the statute did not apply extraterritorially, it would have had no reason to include an exemption for a certain category of individuals employed outside the United States. Alternatively, if Congress believed that the statute would (or might) be interpreted to apply overseas but wished to withhold protection from both Americans and aliens employed abroad, the only sensible way to express that intention would have been to include an exemption encompassing the employment of all individuals abroad. The statute's jurisdictional provisions cannot possibly be read to confer coverage only upon aliens employed outside the United States. Thus, Congress could not rationally have enacted an exemption for the employment of aliens abroad if it intended to foreclose *all* potential extraterritorial applications of the statute.

In this respect, this case is similar to *Pennsylvania* v. *Union Gas Co.*, 109 S. Ct. 2273 (1990). In *Union Gas*, the Court noted that a provision exempting States from certain liability for hazardous waste cleanup manifested Congress's intention that States would be liable for cleanup costs beyond the scope of the exemption. The Court explained that the exemption "is, needless to say, an explicit recognition of the potential liability of States under this statute; Congress need not exempt States from liability unless they would otherwise be liable." *Id.* at 2278. The same inference should be drawn from the alien exemption in this case.[7]

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[7] The Eleventh Amendment imposes a more stringent clear statement requirement than the presumption against extraterritoriality; Congress may abrogate the States' Eleventh Amendment immunity "only by making its intention unmistakably clear in the language of the statute." *Atascadero State Hosp.* v. *Scanlon*, 473 U.S. 234, 242 (1985). Compare *Foley Bros.*, 336 U.S. at 285 (presumption against extraterritoriality is "a valid approach whereby unexpressed congressional intent may be ascertained"). Thus, the reasoning of *Union Gas* applies *a fortiori* to this case. See also *Andrus* v. *Glover Constr. Co.*, 446 U.S. 608, 616-617 (1980) ("Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent.").

Title VII also contains an exemption for religious institutions "with respect to the employment of individuals of a particular religion to perform work connected with" the institutions' "religious activities." This exemption – like the alien exemption as we construe it – clearly withdraws coverage that would

2. With the exception of this case, all judicial decisions addressing the territorial scope of Title VII have concluded that the alien exemption reflects an intention to provide American citizens with protection from employment discrimination abroad.[8] The court of appeals, however, ruled that the exemption could plausibly be read as a means of "provid[ing] Title VII coverage to aliens employed *within* the United States," and suggested that the "negative inference" arising from the exemption was too insubstantial to sustain an extraterritorial application of the statute. Pet. App. 4a, 7a. This line of reasoning is strained and untenable. It requires an exemption to be read as a backhanded grant of coverage; what is more, the court's interpretive gymnastics embody a fundamental misconception of the principles of statutory interpretation that govern the extraterritorial application of statutes.

a. Whatever its implications may be, the alien exemption's office is not to confer statutory protection on aliens inside the United States. The plain language of another provision does that. As this Court noted in *Espinoza*, 414 U.S. at 95, aliens in this country are entitled to protection because they are among the "individuals" referred to in Section 703 of Title VII, 42 U.S.C. 2000e-2. If Congress had entertained any doubt as to whether Section 703 was sufficient to protect resident aliens, the only rational way to erase that uncertainty would have been to include a provision specifically conferring coverage on those individuals. The roundabout tactic of carving out an exemption

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otherwise exist. Further, courts have rejected claims, comparable to respondents' here, that Title VII should be construed to allow discrimination by religious institutions that is outside the scope of the exemption. See *McClure* v. *Salvation Army*, 460 F.2d 553, 558 (5th Cir.), cert. denied, 409 U.S. 896 (1972); *EEOC* v. *Pacific Press Publishing Ass'n*, 676 F.2d 1272, 1276-1277 (9th Cir. 1982).

[8] *Akgun* v. *Boeing Co.*, No. C89-1319D (W.D. Wash. June 7, 1990); *Seville* v. *Martin Marietta Corp.*, 638 F. Supp. 590 (D. Md. 1986); *Bryant* v. *International Schools Services, Inc.*, 502 F. Supp. 472 (D.N.J. 1980), rev'd on other grounds, 675 F.2d 562 (3d Cir. 1982); *Love* v. *Pullman Co.*, 13 Fair Empl. Prac. Cas. (BNA) 423, 426 n.4 (D. Colo. July 21, 1976), aff'd on other grounds, 569 F.2d 1074 (10th Cir. 1978).

from coverage for a different class would not have had the strangely generative effect of creating coverage that did not otherwise exist.

As this Court noted in *Espinoza* v. *Farah Mfg. Co.*, *supra*, the alien exemption does *confirm* Congress's intention to provide protection to aliens within the United States. If the statute could never apply to discrimination against aliens, it would have been unnecessary to exempt aliens with respect to their employment outside this country. It does not follow, however, that the exemption can plausibly be viewed as "meaningful and useful" (Pet. App. 4a) only to the extent it bears on aliens in this country.

To the contrary, the inferences that the exemption supports with respect to the employment of aliens within the United States and the employment of citizens abroad are inseparable and equally compelling. By withdrawing protection from aliens with respect to their employment outside the United States, the exemption establishes that two groups falling outside the exemption – in *Espinoza*, aliens employed inside the United States and, here, citizens employed abroad – are covered. Those inferences are in no sense alternatives to one another. Both flow equally from the alien exemption.

b. The court of appeals' suggestion that a "negative inference" is insufficient to support a statute's extraterritorial application misconceives the nature of the presumption against extraterritoriality. The presumption is an "approach whereby unexpressed congressional intent may be ascertained," *Foley Bros.*, 336 U.S. at 285, not a requirement of form. Title VII combines a broad grant of protection from discrimination with an exemption for the employment of aliens abroad. That combination is an entirely natural way to express an intention to confer coverage on Americans employed abroad. The presumption against extraterritoriality demands nothing more.

3. The legislative history of the alien exemption confirms that its function was to withdraw coverage from aliens abroad

(not, as the court of appeals suggested, to extend coverage to aliens in this country). In the 88th Congress, the alien exemption was initially included in H.R. 405, 88th Cong., 1st Sess. (1963). The committee report on this bill stated that the purpose of the exemption was "to remove conflicts of law which might otherwise exist between the United States and a foreign nation in the employment of aliens outside the United States by an American enterprise." H.R. Rep. No. 570, 88th Cong., 1st Sess. 4 (1963).[9] This explanation demonstrates that the exemption's function was what its form suggests—to withdraw coverage from aliens with respect to their employment abroad. The potential "conflicts of law" to which the report referred could only arise outside the United States; in stating that the exemption was designed to "remove" those potential conflicts, the report manifested the committee's understanding that Title VII would otherwise apply outside the United States.

The committee report on the Senate's employment discrimination bill, S. 1937, 88th Cong., 1st Sess. (1964), included a very similar explanation of the alien exemption: "Exempted from the bill are * * * U.S. employers employing citizens of foreign countries in foreign lands." S. Rep. No. 867, 88th Cong., 2d Sess. 11 (1964). Like its House counterpart, the Senate report made clear that the exemption's purpose was to limit the extraterritorial application of the statute in "foreign lands," not to extend coverage to aliens in this country. If there were any

[9] After H.R. 405 was reported to the floor of the House, the House Committee on the Judiciary held hearings on a number of civil rights bills, including H.R. 405. The committee report on H.R. 405 was incorporated in the record of those hearings. See *Civil Rights: Hearings Before Subcomm. No. 5 of the House Comm. on the Judiciary on Miscellaneous Proposals Regarding the Civil Rights of Persons Within the Jurisdiction of the United States*, 88th Cong., 1st Sess. 2303 (1963). The upshot of the hearings was an omnibus civil rights bill, H.R. 7152, 88th Cong., 1st Sess. (1963). H.R. 405 was incorporated (with amendments not touching the alien exemption) into H.R. 7152, which in turn was subsequently enacted as the Civil Rights Act of 1964. See H.R. Rep. No. 914, 88th Cong., 1st Sess. 57 (1963) (additional views of Rep. Meader).

doubt as to the untenability of the court of appeals' understanding, the provision's legislative history would lay it to rest.

4. The alien exemption distinguishes Title VII from other statutes that this Court has held do not apply outside the United States. For instance, in *Foley Bros.* v. *Filardo, supra*, the Court relied very heavily on the fact that the Eight Hour Law—a statute obligating government contractors to pay overtime to employees who worked more than eight hours in a given day—drew "no distinction * * * between Americans and foreign laborers." 336 U.S. at 286. The Court continued (*ibid.* (emphasis added)):

> Unless we are to read such a distinction into the statute we should be forced to conclude, under respondents' reasoning, that Congress intended to regulate the working hours of a citizen of Iran who chanced to be employed on a public work of the United States in that foreign land. Such a conclusion would be logically inescapable although labor conditions in Iran were known to be wholly dissimilar to those in the United States and wholly beyond the control of this nation. An intention so to regulate labor conditions which are the primary concern of a foreign country should not be attributed to Congress in the absence of a clearly expressed purpose. * * * *The absence of any distinction between citizen and alien labor* indicates to us that the statute was intended to apply only to those places where the labor conditions of both citizen and alien employees are a probable concern of Congress.

By its terms, Title VII draws the very distinction whose absence this Court stressed in *Foley Bros.* In so doing, Title VII manifests Congress's intention to prohibit discrimination by American employers against American citizens abroad.

Indeed, the alien exemption first appeared in proposed fair employment legislation shortly after the decision in *Foley Bros.*, suggesting that it was conceived as a response to that decision. The decision in *Foley Bros.* was issued on March 7, 1949. Six weeks later, on April 29, 1949, Rep. Adam Clayton Powell introduced a fair employment bill, H.R. 4453, 81st Cong., 1st

Sess. (1949), that was apparently the first to include an alien exemption. Evidently, this bill was designed to avoid the problem created by the Eight Hour Law's failure to distinguish between Americans and aliens abroad.

Benz v. *Compania Naviera Hidalgo, S.A.*, 353 U.S. 138 (1957), and *McCulloch* v. *Sociedad Nacional de Marineros de Honduras, supra*, involved attempts to apply American labor statutes to *aliens* employed aboard *foreign flag vessels*, which are analogous to foreign territory[10] – a point that was stressed in both cases. In *Benz*, the Court concluded that "Congress did not fashion [the LMRDA] to resolve labor disputes between nationals of other countries operating ships under foreign laws." 353 U.S. at 143. Similarly, in *McCulloch*, the Court framed the "basic" question as "whether [the NLRA] as written was intended to have any application to foreign registered vessels employing alien seamen." 372 U.S. at 19. The alien exemption precludes comparable applications of Title VII.

By virtue of the alien exemption, applying Title VII to employment discrimination abroad against American citizens by American corporations is entirely consistent with the reasoning of *Foley Bros.*, *Benz*, and *McCulloch*.

C. Other Provisions of Title VII Are Consistent With Its Application to Discrimination by American Employers Against American Citizens Abroad

The court of appeals identified two features of Title VII that it believed were inconsistent with extraterritorial application of the statute – the statute's venue provision and its limitation on the reach of the EEOC's subpoena power. Pet. App. 5a-6a. Upon analysis, neither provision weighs against applying Title VII to discrimination abroad against American citizens by American corporations.

1. Section 706(f)(3) of Title VII, 42 U.S.C. 2000e-5(f)(3), allows an action to be brought "in any judicial district in the State in which the unlawful employment practice is alleged to

[10] See, e.g., *Cunard S.S. Co.* v. *Mellon*, 262 U.S. 100, 123-124 (1923); *United States* v. *Rodgers*, 150 U.S. 249, 264 (1893).

have been committed, in the judicial district in which the employment records relevant to such practice are maintained and administered, or in the judicial district in which the aggrieved person would have worked but for the alleged unlawful employment practice" – or, "if the respondent is not found within any such district, * * * within the judicial district in which the respondent has his principal office." Contrary to the court of appeals' suggestion, this provision does not create any significant venue gap for cases arising from discrimination abroad.

Only the first of the alternatives recognized by the statute – venue in a district in a State in which the unlawful employment practice has occurred – is necessarily unavailable in a case arising from discrimination outside the United States. An American corporation that has engaged in discrimination against an American employee may maintain employment records in the United States; the employee may be able to demonstrate that he or she would have been employed in this country but for the alleged discrimination; and, if venue is unavailable under either of those alternatives, the employer is subject to suit in the district in which its "principal office" is located. Identical language in the Jones Act, 46 U.S.C. 688, has been construed to refer to a defendant's principal office *in the United States*.[11] Thus, federal venue will be available in any case in which the defendant has an office in the United States.

[11] *Stewart* v. *Pacific Steam Navigation Co.*, 3 F.2d 329, 330 (S.D.N.Y. 1924) (L. Hand, J.) ("The phrase 'in which its principal office is located' clearly means in which the principal office of the foreign steamship company is located within the United States."). See *Arrocha* v. *Panama Canal Comm'n*, 609 F. Supp. 231, 235 (E.D.N.Y. 1985) (reaching same result under Title VII). This interpretation is consistent with the language of Title VII's venue provision. It gains further support from the principle that because "Congress does not in general intend to create venue gaps," "in construing venue statutes it is reasonable to prefer the construction that avoids leaving such a gap." *Brunette Machine Works Ltd.* v. *Kockum Indus., Inc.*, 406 U.S. 706, 710 n.8 (1972).

In *Yellow Freight System, Inc.* v. *Donnelly*, 110 S. Ct. 1566 (1990), this Court held that state courts have concurrent jurisdiction over Title VII actions. In our view, Title VII should not be construed to limit the venue of state courts hearing Title VII suits. See *Bainbridge* v. *Merchants & Miners Transp. Co.* 287 U.S. 278 (1932).

Even if Title VII were construed to create a venue gap for some cases arising out of discrimination abroad, it would not follow that Title VII should be interpreted to exempt all discrimination outside the United States. At most, the existence of such a gap would suggest that Congress was unwilling to allow Americans employed abroad a wider choice of venue than that available to victims of discrimination in this country. There is no indication that the venue provision was tied to Congress's understanding of the scope of the statute—and no other reason to assume that Congress intended Title VII's venue tail to wag the statutory dog.

2. For similar reasons, Title VII's limitation on the Commission's subpoena power does not justify restricting the Act to discrimination within the United States. At present, the Commission is empowered to issue subpoenas requiring attendance of witnesses and production of evidence "from any place in the United States or any Territory or possession thereof." 42 U.S.C. 2000e-9 (incorporating 29 U.S.C. 161(1)).[12] This limitation—which operates solely on Commission subpoenas, not (as the majority below suggested) on the EEOC's "investigatory powers"—falls far short of suggesting that the Commission lacks any authority to remedy discrimination against Americans abroad, let alone that the statute fails to reach such discrimination.

In all respects save its subpoena authority, the Commission's investigatory powers are subject to no geographical restriction.

[12] This provision was enacted in 1972. Before that time, the Commission secured evidence by means of demands that were enforceable by court order, but "the attendance of a witness [could] not be required outside the State where he is found, resides, or transacts business and the production of evidence [could] not be required outside the State where such evidence is kept." Civil Rights Act of 1964, Pub. L. No. 88-352, Tit. VII, § 710(a), 78 Stat. 264. In our view, the difference between this provision and the provision substituted in 1972 is not material to the question presented in this case. In one respect, however, the 1972 amendment has apparently enhanced the Commission's ability to investigate discrimination abroad. Comparable statutes have been held to permit service of a subpoena in this country for documents located elsewhere. See, *e.g.*, *CFTC* v. *Nahas*, 738 F.2d 487, 492 & n.11, 495-496 (D.C. Cir. 1984).

Section 706(a) of the Act, 42 U.S.C. 2000e-5(a), empowers the Commission to conduct an investigation "[w]henever a charge is filed" alleging an unlawful employment practice. For purposes of those investigations, the Commission enjoys "access to, for the purposes of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to unlawful employment practices covered by [Title VII] and is relevant to the charge under investigation." 42 U.S.C. 2000e-8. Although the Commission's right of access may not be fully enforceable by subpoena, there is no suggestion that its investigatory authority is limited to discrimination occurring in the United States.

Nor is there any territorial limitation on the Commission's other functions under the Act. Nothing in the provisions conferring authority on the Commission to conciliate charges of discrimination, to initiate lawsuits, and to seek interim relief restricts the Commission to discrimination in the United States, 42 U.S.C. 2000e-5(b) and (f). The limit on the EEOC's administrative subpoena authority does not foreclose the Commission's performance of those functions—or impose any restraint on the pursuit of private actions under Title VII. Upon the filing of a lawsuit, the Commission or a private plaintiff may obtain evidence required for a judicial action by means of judicial subpoenas served in this country (Fed. R. Civ. P. 45), subpoenas to American citizens abroad (28 U.S.C. 1783), discovery under the Federal Rules of Civil Procedure, and procedures available under international agreements. See *Societe Nationale Industrielle Aerospatiale* v. *United States District Court*, 482 U.S. 522 (1987) (discussing the principles regulating the choice among these alternatives).

Finally, there is no necessary relationship between an agency's subpoena power and the scope of the statute it is empowered to enforce.[13] The statute authorizing the EEOC to issue sub-

[13] See *FTC* v. *Compagnie de Saint-Gobain-Pont-a-Mousson*, 636 F.2d 1300, 1322 (D.C. Cir. 1980) (noting the distinction between the FTC's authority to serve subpoenas outside the United States and "the larger question of the FTC's authority to investigate both domestic and foreign corporations whose actions have harmful effects on U.S. commerce").

poenas compelling the attendance of witnesses "from any place in the United States or any Territory or possession thereof" (42 U.S.C. 2000e-9 (incorporating 29 U.S.C. 161(1)) is virtually identical to provisions conferring subpoena authority on many other federal agencies, some of which administer statutes reaching conduct outside the United States.[14] A limitation on Title VII's substantive provisions may not properly be inferred from the scope of the Commission's subpoena authority.

D. The EEOC, the Agency Charged With Administrative Enforcement of Title VII, Has Interpreted the Statute to Apply to Discrimination Against Americans Abroad

The EEOC has consistently construed Title VII to apply to discrimination against American citizens outside the United States. In 1975, the EEOC's General Counsel, in a letter to Senator Frank Church, stated that "[t]he language of Title VII indicates a Congressional intent to make the Title applicable to American citizens employed by American companies operating overseas." J.A. 48. If the alien exemption "is to have any meaning at all," the letter explained, "it is necessary to construe it as expressing a Congressional intent to extend the coverage of Title VII to include employment conditions of citizens in overseas operations of domestic corporations at the same time it excludes aliens of the domestic corporation from the operation of the statute." J.A. 49. The letter added that this construction was consistent with the purposes of the statute, noting that "[o]verseas employment practices of covered employers can have a very substantial impact on the employment opportunities in domestic corporations." *Ibid.*

In 1984, the Chairman of the EEOC testified before a subcommittee of the Senate that the alien exemption was indicative of an intention to prohibit discrimination against

[14] For instance, the subpoena authority that the Commission enjoys under the ADEA, a statute applying abroad, is limited to compelling the attendance of witnesses and the production of evidence "from any place in the United States." 15 U.S.C. 49 (incorporated in 29 U.S.C. 209, 626(a)). The SEC's authority under the Securities Exchange Act of 1934 embodies the same limitation. 15 U.S.C. 78s(b).

Americans abroad.[15] The Commission adhered to that interpretation of the statute in a decision issued in 1985. EEOC Dec. No. 85-16, Empl. Prac. Dec. (CCH) ¶ 6856 (Sept. 16, 1985). Citing the alien exemption and district court decisions sustaining Title VII's extraterritorial application, the Commission concluded that "the Act does apply to covered employers with respect to their employment of U.S. citizens outside the United States." *Id.* at 7072.[16] The EEOC is one of two federal agencies with primary responsibility for enforcing Title VII. Its interpretation, which is consistent with the language and legislative history of the relevant provisions, reinforces the conclusion that Congress intended the statute to apply to Americans employed by American employers abroad. See, *e.g.*, *EEOC* v. *Commercial Office Products Co.*, 486 U.S. 107, 115 (1988).

The Justice Department—the other federal agency with Title VII responsibility—has also interpreted the statute to reach discrimination abroad against American citizens. In 1975, an Assistant Attorney General testified before committees of both Houses of Congress that the alien exemptions in Sections 702 and 717 of Title VII imply that the statute applies outside the United States. He stated:

> It should be noted that both Executive Order 11478 and § 717 of Title VII specify that they are not applicable to "aliens employed outside the limits of the United States." The implication of this is that they do apply to United States citizens employed throughout the world.

[15] *Age Discrimination and Overseas Americans, 1983: Hearing Before the Subcomm. on Aging of the Senate Comm. on Labor and Human Resources*, 98th Cong., 1st Sess. 2-4 (1983) (testimony of Clarence Thomas).

[16] Recently, the Commission has issued a statement clarifying its policy with respect to the handling of charges of discrimination against corporations operating abroad. Policy Statement No. N-915.033, EEOC Compl. Man. (BNA), at 605:0055 (Sept. 2, 1988). The Commission has also applied Title VII to claims of federal employees employed by the federal government abroad. See *Cole* v. *Secretary of the Army*, EEOC Dec. No. 05890142 (Aug. 23, 1989); *Hedges* v. *Secretary of Defense*, EEOC Dec. No. 05900454 (June 1, 1990). Section 717 of Title VII, 42 U.S.C. 2000e-16, prohibits invidious discrimination in "[a]ll personnel actions affecting employees or applicants for employment (except with regard to aliens employed outside the limits of the United States)."

> With respect to discrimination in employment by private companies and individuals, Title VII of the 1964 Civil Rights Act, as amended, prohibits a broad range of "unlawful employment practices" by any private employer "engaged in an industry affecting commerce who has fifteen or more employees." * * * Once again the [statute] contains an exemption "with respect to the employment of aliens outside any State," which implies that it is applicable to the employment of United States citizens by covered employers anywhere in the world.[17]

These administrative interpretations of Title VII provide further support for the statute's application to this case. See *Foley Bros.*, 336 U.S. at 288-290.

II. CONCERN FOR POTENTIAL CONFLICTS WITH THE LAWS OF OTHER NATIONS DOES NOT WARRANT LIMITING TITLE VII TO DISCRIMINATION WITHIN THE UNITED STATES

In determining the scope of federal statutes, this Court has been sensitive to potential conflicts between our laws and those of foreign states.[18] In this case, the court of appeals placed great weight on what it perceived as Title VII's lack of attention to such conflicts. The court drew a contrast between Title VII's references to state fair employment laws and its treatment of foreign law. "If Congress had intended the Act to apply in foreign countries," the court stated, "we would expect Congress

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[17] *Foreign Investment and Arab Boycott Legislation: Hearings Before the Subcomm. on International Finance of the Senate Comm. on Banking, Housing and Urban Affairs*, 94th Cong., 1st Sess. 165 (1975) (testimony of Assistant Att'y Gen. Scalia). Accord *Discriminatory Arab Pressure on U.S. Business: Hearings Before the Subcomm. on International Trade and Commerce of the House Comm. on International Relations*, 94th Cong., 1st Sess. 87-88 (1975); *Discriminatory Overseas Assignment Policies of Federal Agencies: Hearings Before a Subcomm. of the House Comm. on Government Operations*, 94th Cong., 1st & 2d Sess. 87-89 (1975-1976).

[18] *McCulloch* v. *Sociedad Nacional de Marineros de Honduras*, 372 U.S. at 21; *Benz* v. *Compania Naviera Hidalgo, S.A.*, 353 U.S. at 145-146. See also *Steele* v. *Bulova Watch Co.*, 344 U.S. at 289.

to have been even more careful to address conflicts with foreign discrimination laws. Yet the statute says nothing about potential conflicts with foreign discrimination laws." Pet. App. 5a. In the same vein, the court contrasted Title VII with statutes in which Congress had "demonstrated * * * its awareness of the need to * * * address the concerns of conflicting foreign law" (*id.* at 6a). This reasoning mischaracterizes Title VII and overstates the statute's potential to generate conflicts with foreign law.

A. The Alien Exemption Represents Congress's Solution to Potential Conflicts of Laws

Contrary to the court of appeals' suggestion, Title VII does speak to potential conflicts between Title VII and foreign law. The stated purpose of the alien exemption is to mitigate potential conflicts with foreign law—in the words of the relevant committee report, "to remove conflicts of law which might otherwise exist between the United States and a foreign nation in the employment of aliens outside the United States by an American enterprise." H.R. Rep. No. 570, *supra*, at 4. The alien exemption thus embodies Congress's accommodation of the goals of eradicating employment discrimination and avoiding conflicts with foreign law. Congress "alone has the facilities necessary to make fairly such an important policy decision." *Benz*, 353 U.S. at 147; see *McCulloch*, 372 U.S. at 22. Congress addressed the problem and struck a balance it considered appropriate; the courts are not at liberty to restrike the balance.

B. Properly Applied, Title VII Does Not Create a Serious Potential for Conflicts with International Norms or the Laws of Foreign States

1. Applied to discrimination by American corporations against American employees, Title VII does not give rise to significant conflicts with international norms or the law of foreign states. Both Boureslan and respondents are American

nationals.[19] As this Court has recognized, "the United States is not debarred by any rule of law from governing the conduct of its own citizens upon the high seas or even in foreign countries when the rights of other nations or their nationals are not infringed." *Skiriotes* v. *Florida*, 313 U.S. 69, 73 (1941).[20] That is so even when the result is dual regulation; international law accepts the possibility that more than one state's law may apply simultaneously to a given course of conduct. Restatement (Third) of the Foreign Relations Law of the United States § 403(3) & comment d (1986).

In cases of dual regulation, application of Title VII is unlikely to generate serious conflicts with the laws of individual foreign states. In view of the emerging international consensus on employment discrimination, cases in which foreign law requires American corporations to discriminate on the basis of race, sex, national origin, or religion are likely to be rare.[21] In this case, for instance, respondents have not suggested that any Saudi law mandated discrimination against Boureslan. The possibility that the United States and another nation may both prohibit a particular form of discrimination—or that the other nation's laws neither compel nor prohibit discrimination that is unlawful under Title VII—does not give rise to a conflict of the type that

[19] See Restatement (Third) of the Foreign Relations Law of the United States § 213 (1986) ("For purposes of international law, a corporation has the nationality of the state under the laws of which the corporation is organized."). Cf. *Sumitomo Shoji America, Inc.* v. *Avagliano*, 457 U.S. 176 (1982) (under treaty between Japan and the United States, U.S.-incorporated subsidiaries of Japanese corporations are deemed corporations of the United States).

[20] Accord *Vermilya-Brown Co.* v. *Connell*, 335 U.S. 377 (1948); *Blackmer* v. *United States*, 284 U.S. 421, 436-437 (1932); Restatement (Third) of the Foreign Relations Law of the United States § 402(2) (1986) (except when it would be unreasonable, "a state has jurisdiction to prescribe law with respect to • • • the activities, interests, status, or relations of its nationals outside as well as within its territory").

[21] See Note, *Equal Employment Opportunity for Americans Abroad*, 62 N.Y.U. L. Rev. 1288, 1297-1299 (1987) (and authorities cited therein).

could justify overriding the legislative judgment reflected in the alien exemption.[22]

Even when foreign law compels discrimination that Title VII would otherwise prohibit, defenses available under Title VII serve to mitigate the resulting conflicts. If foreign law requires positions to be filled with persons of a particular sex, nationality, or religion, then that particular characteristic can be considered a bona fide occupational qualification within the meaning of 42 U.S.C. 2000e-2(e).[23] In certain cases, compliance with foreign law may also furnish a non-discriminatory justification for employment decisions that would otherwise be unlawful.[24] The

[22] By contrast, in *McCulloch*, 372 U.S. at 21, application of the NLRA to the foreign crews of foreign flag vessels would have given rise to a "head-on collision" with Honduran law. Under that law, a Honduran union was the exclusive bargaining agent of the ships' crews, and unions of other nationalities were prohibited from acting in that capacity. Recognition of an American union as the bargaining representative would have squarely violated Honduran law.

[23] That Section provides, in pertinent part:

> Notwithstanding any other provision of this subchapter, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees • • • on the basis of [their] religion, sex or national origin in those instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise • • •.

In *Kern* v. *Dynaelectron Corp.*, 577 F. Supp. 1196 (N.D. Tex. 1983), aff'd, 746 F.2d 810 (5th Cir. 1984), the court held that membership in the Islamic faith was a bona fide occupational qualification for a position that involved flying helicopters to Mecca, since under Saudi Arabian law non-Moslems are barred from Mecca under penalty of death.

[24] In EEOC Dec. No. 85-10, Empl. Prac. Dec. (CCH) ¶ 6851 (July 16, 1985), a contract in which an American employer agreed to provide air traffic control services to a foreign country authorized the host country to review and approve the hiring of the air traffic controllers who were to perform the contract. The country withheld a work permit from a female air traffic controller, explaining that its customs and laws prohibited the employment of women in most jobs. Finding that there was a "current, authoritative, and factual basis" for the employer's belief that the host country would not admit the particular controller, the Commission held that there was "a legitimate, nondiscriminatory reason for not hiring [her]." *Id.* at 7053. See Restatement (Third) of the Foreign Relations Law of the United States § 441 & comment b (1986).

availability of these defenses reduces the likelihood that employers will be placed in a position in which it is impossible to comply with both Title VII and the law of a foreign state. Courts may also take foreign law into account in fashioning equitable relief.[25]

2. As the court of appeals noted, more difficult issues would be presented by Title VII's application to *foreign* employers with respect to the employment of Americans abroad. Pet. App. 5a-6a. The court erred, however, in embracing the all-or-nothing proposition that Title VII must be interpreted to apply either to all Americans employed abroad or to none of them. In *United States* v. *Aluminum Co. of America*, 148 F.2d 416, 443 (2d Cir. 1945), the Second Circuit noted that the exceptionally broad language in the Sherman Act could be interpreted to embody accepted international limits on prescriptive jurisdiction. The court explained that courts are "not to read general words, such as those in [the Sherman Act], without regard to the limitations customarily observed by nations upon the exercise of their powers." *Ibid.* This Court has employed a similar approach in interpreting federal maritime statutes. *Lauritzen* v. *Larsen*, 345 U.S. 571, 577 (1953).[26]

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[25] The Commission's policy statement on the extraterritorial enforcement of Title VII requires field offices to contact the Commission's Title VII Division if an issue arises concerning a potential conflict with a foreign state's law; the Division then coordinates with the Department of State. EEOC Policy Statement No. N-915.033, *supra*, at 605:0057.

[26] See *Romero* v. *International Terminal Operating Co.*, 358 U.S. 354, 382 (1959); *United States* v. *Palmer*, 16 U.S. (3 Wheat.) 610, 631 (1818). In *Lauritzen*, this Court held that the Jones Act – which creates a damages remedy in favor of "[a]ny seaman who shall suffer personal injury in the course of his employment" – does not apply to an injury suffered by a foreign seaman injured aboard a foreign flag vessel in a foreign port. The Court explained that "[b]y usage as old as the Nation, [American shipping] statutes have been construed to apply only to areas and transactions in which American law would be considered operative under prevalent doctrines of international law." 345 U.S. at 576-577. That approach, the Court continued, was in "accord with the long-heeded admonition of Mr. Chief Justice Marshall that 'an act of congress ought never to be construed to violate the law of nations if any other possible construction remains.' " *Id.* at 578 (quoting *Murray* v. *The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804)). See also *Weinberger* v. *Rossi*, 456 U.S. 25, 32 (1982) (noting this principle's force as applied "to the construction of statutes couched in general language which are sought to be applied in an extraterritorial way"); *McCulloch* v. *Sociedad Nacional de Marineros de Honduras*, 372 U.S. at 21-22; Steinhardt, *The Role of International Law As a Canon of Domestic Statutory Construction*, 43 Vand. L. Rev. 1103, 1142-1143 (1990).

International law recognizes a state's jurisdiction to prescribe rules governing its nationals' relations with one another, and the depth of the United States' interest in eliminating discrimination from those relationships cannot be gainsaid. Thus, application of American law to discrimination by an American corporation against an American citizen is entirely consistent with international law. Limiting principles applied in *Alcoa* and *Lauritzen* are available to avoid extreme applications of Title VII that would be violative of international law. Thus, Title VII does not present the stark choice that the court of appeals perceived, and concern about the consequences of applying Title VII to foreign employers cannot justify withholding its protections from Boureslan in this case.[27]

C. Title VII's Treatment of Conflicts with State Law Provides No Basis for Questioning the Extraterritorial Application of the Statute

Citing Title VII's references to state fair employment laws, the court of appeals suggested that Congress could not have in-

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[27] In its policy statement on the application of Title VII to discrimination outside the United States, the EEOC has recognized that "[w]here the discrimination takes place overseas, the status of the employer as an American or foreign company is significant." EEOC Policy Statement No. N-915.033, *supra*, at 605:0061.

The legislative history of the alien exemption suggests that Congress's focus was on prohibiting discrimination by "American enterprise[s]." H.R. Rep. No. 570, *supra*, at 4. See S. Rep. No. 867, *supra*, at 11 (referring to "U.S. employers" in "foreign lands"). This case, of course, presents only the question of Title VII's application to alleged discrimination by an American corporation against an American citizen.

tended to apply Title VII to discrimination outside the United States without including equivalent provisions addressing foreign laws. Pet. App. 5a. This reasoning rests on a misapprehension of Title VII. Title VII provides for limited deference to state fair employment *procedures* that are *consistent* with Title VII, but does not subordinate its *substantive* provisions to any *conflicting* requirements of state law. In this light, the fact that the statute also provides no express exception for potentially conflicting foreign laws creates no anomaly that undercuts Title VII's application abroad.

When a State has a law prohibiting the unlawful employment practice alleged in a particular case, the charging party is obligated to file a charge with the State prior to filing a charge with the Commission; the EEOC is obligated to afford the State an opportunity to remedy the practice before seeking its own relief; and, in making its determination as to whether there is reasonable cause to believe that a charge is true, the Commission must "accord substantial weight to final findings and orders made by State or local authorities" in proceedings triggered by those requirements. 42 U.S.C. 2000e-5(b) to 2000e-5(d).[28] The fact that Congress chose not to extend these procedures to foreign governments administering unfamiliar employment laws does not even remotely suggest that it intended to withdraw all protection from Americans employed abroad.

Title VII does not accommodate *conflicting* state fair employment laws. To the contrary, Title VII supersedes any state law that "purports to require or permit the doing of any act which would be an unlawful employment practice under Title VII." 42 U.S.C. 2000e-7. Thus, Title VII is, if anything, less tolerant of conflicts with state law than it is of conflicts with foreign substantive law. Even assuming for the moment that Congress can be expected to view foreign law as equivalent to state law, Title VII does not distinguish between them in a manner casting doubt on its application to Americans abroad.

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[28] Section 709(b), 42 U.S.C. 2000e-8(b), also authorizes the Commission to engage in various forms of cooperation with state and local fair employment agencies.

D. The 1984 Amendments to the ADEA Do Not Justify A Distinction Between Age Discrimination and Discrimination Based Upon Race, Sex, National Origin, or Religion

The court of appeals' emphasis on the distinction between Title VII and the 1984 amendments to the Age Discrimination in Employment Act was also misplaced. The ADEA amendments were enacted after several courts of appeals had held that that statute did not apply abroad.[29] The legislation's express purpose was to confer on American citizens employed abroad the *same protection* against age discrimination that, Congress was advised, Americans already enjoyed from other forms of invidious employment discrimination. Senator Grassley, sponsor of the ADEA amendments, explained that the amendments would "clear[ ] up an anomaly" between the ADEA and Title VII as applied to discrimination abroad. 129 Cong. Rec. 34,499 (1983).[30] The ADEA amendments thus provide no support for the view that the 1964 Congress that enacted Title VII was less concerned with eradicating discrimination against Americans abroad based on race, sex, national origin, and religion than the 1984 Congress was with age discrimination.[31]

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[29] *Zahourek* v. *Arthur Young & Co.*, 750 F.2d 827 (10th Cir. 1984); *Cleary* v. *United States Lines, Inc.*, 728 F.2d 607 (3d Cir. 1984). After the ADEA was amended, other courts reached the same conclusion regarding the original version of the statute. *Lopez* v. *Pan Am World Services, Inc.*, 813 F.2d 1118 (11th Cir. 1987); *DeYoreo* v. *Bell Helicopter Textron, Inc.*, 785 F.2d 1282 (5th Cir. 1986); *Ralis* v. *RFE/RL, Inc.*, 770 F.2d 1121 (D.C. Cir. 1985); *Pfeiffer* v. *William Wrigley Jr. Co.*, 755 F.2d 554 (7th Cir. 1985); *Thomas* v. *Brown & Root, Inc.*, 745 F.2d 279 (4th Cir. 1984). These decisions often noted that the alien exemption distinguished Title VII from the ADEA. *E.g.*, *Cleary* v. *United States Lines, Inc.*, 728 F.2d at 609.

[30] During hearings on the proposed legislation, the EEOC's Chairman testified that Title VII had been construed to apply to discrimination outside the United States. See *Age Discrimination and Overseas Americans, 1983: Hearing Before the Subcomm. on Aging of the Senate Comm. on Labor and Human Resources*, 98th Cong., 1st Sess. 2-4 (1983) (testimony of Clarence Thomas).

[31] The provisions of Title VII at issue in this case and the ADEA are not the only prohibitions on employment discrimination outside the United States. See Act of Sept. 28, 1971, Pub. L. No. 92-129, Tit. I, § 106, 85 Stat. 355 (pro-

Title VII, no less than the ADEA, manifests a clear intention to provide American citizens with protection from invidious employment discrimination abroad. The language of Title VII demonstrates that Congress foresaw the statute's application to discrimination outside the United States and tailored its coverage by exempting aliens with respect to employment outside the United States. Nothing in the statute is inconsistent with its application to employment discrimination by American corporations against Americans abroad. The courts below erred in failing to enforce Title VII according to its terms.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

JOHN R. DUNNE
Assistant Attorney General

JOHN G. ROBERTS, JR.
Deputy Solicitor General

DONALD R. LIVINGSTON
Acting General Counsel

STEPHEN L. NIGHTINGALE
Assistant to the Solicitor General

GWENDOLYN YOUNG REAMS
Associate General Counsel

VINCENT J. BLACKWOOD
Assistant General Counsel

SAMUEL A. MARCOSSON
Attorney
Equal Employment Opportunity Commission

NOVEMBER 1990

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hibiting discrimination against American citizens and their dependents on American military bases abroad); 50 U.S.C. App. 2407 (authorizing regulations prohibiting discrimination on basis of race, religion, sex or national origin to comply with foreign boycotts).

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Supreme Court, U.S.
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Nos. 89-1838, 89-1845

In the Supreme Court of the United States

OCTOBER TERM, 1990

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, PETITIONER

v.

ARABIAN AMERICAN OIL CO., ET AL.

ALI BOURESLAN, PETITIONER

v.

ARABIAN AMERICAN OIL CO., ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JOINT APPENDIX

PAUL L. FRIEDMAN
White & Case
1747 Pennsylvania Ave. N.W.
Washington, D.C. 20006
(202) 872-0012
Counsel for Respondents

KENNETH W. STARR
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217
Counsel for Petitioner in No. 89-1838

MICHAEL A. MANESS
1900 North Loop West-Suite 500
Houston, Texas 77018
(713) 680-9922
Counsel for Petitioner in No. 89-1845

In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 89-1838

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, PETITIONER

v.

ARABIAN AMERICAN OIL CO., ET AL.

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JOINT APPENDIX

TABLE OF CONTENTS*

		Page
1.	Relevant docket entries in the court of appeals .	1
2.	Relevant docket entries in the district court ...	2
3.	Plaintiff Ali Boureslan's First Amended Original Petition	7

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* The opinions of the court of appeals and the district court are printed in the appendices to the petitions for writs of certiorari and have not been reproduced here.

TABLE OF CONTENTS—Continued

		Page
4.	Defendant Arabian American Oil Company's Motion to Dismiss	11
5.	Defendant Aramco Services Company's Motion to Dismiss	14
6.	Defendant Aramco Services Company's Second Motion to Dismiss	17
7.	Affidavit of Saeed Al-Ali	20
8.	Affidavit of Ahmed S. Humaid	23
9.	Declaration of Ismail S. Nazer	26
10.	Joint Pretrial Order	29
11.	Affidavit of Seth L. Sharr	41
12.	Final Judgment [of the district court]	44
14.	Part 1606—Guidelines on Discrimination Because of National Origin, 35 Fed. Reg. 421 (Jan. 13, 1970)	45
13.	Letter, dated March 14, 1975, to Senator Frank Church from William A. Carey	48
14.	Order granting certiorari in 89-1838	50
15.	Order granting certiorari in 89-1845	51

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 87-2206

ALI BOURESLAN, PLAINTIFF-APPELLANT

v.

ARAMCO, ARABIAN AMERICAN OIL CO. AND ARAMCO SERVICES COMPANY, DEFENDANTS-APPELLEES

DOCKET ENTRIES

10/17/88	Opinion Rendered [by the panel]
11/7/88	Flg. Order GRANTING motion of former amicus, the U.S. E.E.O.C. for leave to intervene as an appellant in the ongoing appeal of this cause. (WED).
11/14/88	Petition for Rehearing (J) BOURESLAN
11/14/88	Petition for Rehearing (J) EEOC
12/23/88	Order on Petition for Rehearing
12/23/88	Filing order that case be reheard en banc with oral argument before all active judges.
2/2/90	Opinion Rendered [by the court sitting *in banc*]
2/2/90	Flg. & Entg. Judgment
2/26/90	Jdgt. as Mdt. Issd. to Clerk

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS

No. H-85-3506

ALI BOURESLAN, PLAINTIFF

v.

ARAMCO, ARABIAN AMERICAN OIL COMPANY
AND ARAMCO SERVICES COMPANY, DEFENDANTS

DOCKET ENTRIES

6/20/85 ORIGINAL COMPLAINT, with JURY DEMAND, filed.

9/12/85 ARAMCO'S ORIGINAL ANSWER, filed, kk dkt'd 9-13-85

3/18/86 Deft's, Aramco Services Company, ORIGINAL ANSWER, filed, jr dkt'd 4/9/86

10/24/86 Pltf's FIRST AMENDED ORIGINAL PETITION, filed. jr dkt'd 10/27/86

10/30/86 Deft, ARAMCO'S MOTION TO DISMISS, filed. jr dkt'd 10/31/86

10/30/86 Deft, ARAMCO'S MEMORANDUM OF AUTHORITIES in Support of Motion to Dismiss, filed. jr dkt'd 10/31/86

10/30/86 Deft, ARAMCO SERVICES' MOTION TO DISMISS, filed. jr dkt'd 10/31/86

10/30/86 Deft, ARAMCO SERVICES' MEMORANDUM OF LAW in Support of Motion to Dismiss, filed. jr dkt'd 10/31/86

10/30/86 Deft, ARAMCO SERVICES' SECOND MOTION TO DISMISS, filed. jr dkt'd 10/31/86

10/30/86 Deft, ARAMCO SERVICES' MEMORANDUM OF LAW in Support of Second Motion to Dismiss, filed. jr dkt'd 10/31/86

10/30/86 AFFIDAVIT OF MOHAMMED SAEED AL-ALI, filed. jr dkt'd 10/31/86

11/10/86 (JDA) ORDER, filed. Parties ntf'd. jr Defts unopposed Motion for Leave to file Dispositive motions is GRANTED. Pltf shall respond to deft's Motion to Dismiss and Second motion to dismiss by Dec. 1, 1986. Pretrial conference is set for Dec. 10, 1986 at 3:30 p.m. dkt'd 11/12/86

11/14/86 AFFIDAVIT OF AHMED S. HUMAID, filed. jr dkt'd 11/17/86

11/14/86 DECLARATION OF ISMAIL S. NAZER, filed. jr dkt'd 11/17/86

11/14/86 Pltf's RESPONSE TO DEFT, ARABIAN AMERICAN OIL CO'S MOTION TO DISMISS, filed. jr dkt'd 11/17/86

11/14/86 Pltf's RESPONSE TO DEFT ARAMCO SERVICES CO'S FIRST MOTION TO DISMISS, filed. jr dkt'd 11/17/86

11/14/86 Pltf's RESPONSE TO DEFT ARAMCO SERVICES CO'S SECOND MOTION TO DISMISS, filed. jr dkt'd 11/17/86

11/14/86 Pltf's MEMORANDUM OF LAW IN SUPPORT OF PLTF ALI BOURESLAN'S RESPONSE TO DEFT ARAMCO SERVICES CO'S SECOND MOTION TO DISMISS, filed. jr dkt'd 11/17/86

11/18/86 Pltf's SUPPLEMENTAL RESPONSE to deft Aramco Service Co.'s Second Motion to Dismiss, filed. db

11/18/86 Plft's SUPPLEMENTAL RESPONSE to deft Aramco's First Motion to Dismiss, filed. db dkt'd 11/19/86

11/25/86 JOINT PRETRIAL ORDER, FILED. w/
1. Pltf's Witness List
2. Deft's Witness List jr dkt'd 12/1/86

12/9/86 Deft, Aramco Services Company's MEMORANDUM in Reply to Pltf's Response to Deft Aramco Services Co's First Motion to Dismiss, filed. jr dkt'd 12/9/86

12/9/86 Deft, Aramco Services Company's MEMORANDUM in Reply to Pltf's Response to Deft Aramco Services Co's Second Motion to Dismis, filed. jr dkt'd 12/9/86

12/10/86 AFFIDAVIT of Seth L. Sharr, filed. jr dkt'd 12/10/86

12/10/86 (JDA) PRETRIAL/MOTION CONFERENCE ORDER, filed. Parties ntf'd. jr.

APPEARANCES: Perry Archer f/pltf; John Roady, Linda Headley & Bob Horton f/deft (Rptr: H. Chester)

1. Def'ts Motion to Dismiss is taken under advisement. The court will rule on the record.
2. Trial is RESET to April 6, 1987 at 9:30 a.m.
3. Discovery is EXTENDED to Feb. 28, 1987.

4. If appropriate, an amended pretrial order may be filed by Mar. 20, 1987.
5. Deft ASC is GRANTED leave to file an amended answer. dkt'd 12/12/86

12/10/86 Pltf's RESPONSE to Deft Aramco Services Company's Memo in Reply to Pltf's Response to Deft Aramco Services Co's First and Second Motions to Dismiss, filed. jr dkt'd 12/15/86

12/15/86 Deft, Arabian American Oil Co's SUPPLEMENTAL MEMORANDUM of Deft Arabian American Oil Co in Support of Its Motion to Dismiss and in Reply to Pltf's Response to Such Motion, filed. jr dkt'd 12/15/86

12/15/86 Deft Aramco Services Co's SUPPLEMENTAL MEMORANDUM in Reply to Pltf's Response to Deft Aramco Services Co's First Motion to Dismiss, filed. jr dkt'd 12/15/86

12/15/86 Deft Aramco Services Co's MOTION FOR ORAL HEARING, filed. jr (RE: Motion to Dismiss and Second Motion to Dismiss). dkt'd 12/15/86

12/15/86 Pltf, Ali Boureslan's SUPPLEMENTAL BRIEF AND MEMORANDUM OF AUTHORITIES in Support of the Extraterritorial Application of Title VII, filed. jr dkt'd 12/15/86

12/16/86 Plft's RESPONSE to Deft Aramco Services Co's Motion for Oral Hearing, filed. jr dkt'd 12/18/86

1/27/87 (JDA) MEMORANDUM AND ORDER, filed. Parties ntfd. Defts' Motions to dismiss granted. Dktd 1-3-87, cat.

1/27/87 (JDA) FINAL JUDGMENT, filed. Parties ntf. Final judgment entered for defts. Dktd 1-30-87, cat.

2/25/87 Pltf. NOTICE OF APPEAL to Final Judgment entered Jan. 27, 1987, filed. mac

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Civil Action No. H-85-3506

ALI BOURESLAN, PLAINTIFF

v.

ARABIAN AMERICAN OIL COMPANY AKA ARAMCO, AND ARAMCO SERVICES COMPANY, DEFENDANTS

[Filed Oct. 24, 1986]

COMPLAINT: DISCRIMINATION

PLAINTIFF ALI BOURESLAN'S
FIRST AMENDED ORIGINAL PETITION

THE HONORABLE JUDGE OF SAID COURT:

I.

INTRODUCTION

1. This is an action seeking redress for the violation of rights guaranteed to the Plaintiff by Title VII of the Civil Rights Act of 1964, and other laws of the United States of America and the State of Texas.

2. The Plaintiff is a naturalized American citizen who was born in Lebanon, and is by race an Arab whose religion is Moslem.

II.

JURISDICTION

3. Jurisdiction of this Court is invoked under Title VII of the Civil Rights, Act, 42 U.S.C. 2000(e) and applicable laws of the State of Texas.

4. The Plaintiff filed complaint with the Equal Employment Opportunity Commission and on April 17, 1985, was given a Notice of Right to Sue.

5. This action is timely filed.

III.

PARTIES

6. Plaintiff is a resident of El Paso, Texas.

7. Defendants ARABIAN AMERICAN OIL COMPANY aka ARAMCO, and ARAMCO SERVICES COMPANY have been served with process and their Original Answers are currently on file with this Honorable Court.

IV.

ALLEGATIONS

8. On or about July, 1979, Plaintiff began working for ARAMCO SERVICES COMPANY. On or about November, 1980, Plaintiff transferred to and began working for ARABIAN AMERICAN OIL COMPANY aka ARAMCO. Plaintiff was hired in Texas.

9. At all times up to Plaintiff's wrongful discharge by Defendants, Plaintiff performed his duties as an engineer in a satisfactory fashion.

10. Beginning in September, 1982, Plaintiff's supervisor began to systematically mistreat and harass Plaintiff. This mistreatment and harassment of Plaintiff began following disputes and arguments about Plaintiff's national origin, religion, and race. Mistreatment and harassment continued for a long period of time during which time Plaintiff complained to his superiors. Plaintiff's complaints were at first ignored.

11. In February, 1982, Plaintiff filed a formal grievance which resulted in apologies for the national origin, racial, and religious insults. At various times, Defendants' management personnel maintained to Plaintiff that his supervisor's racial and religion harassment was a personal matter between Plaintiff and his supervisor.

12. Up until early 1982, Defendants' evaluations of Plaintiff's performance were satisfactory or better.

13. In early 1982, as a result of Plaintiff's conflicts with Defendants about race, national origin, and religion, and the fact that Plaintiff had complained about the discrimination, Defendants set out to create a record that would justify firing Plaintiff. This was done despite Plaintiff's vigorous attempts to maintain his good standing and protect his job.

14. On June 16, 1984, Defendants terminated Plaintiff. At that time Plaintiff's salary was $4,114.00 per month.

15. The Plaintiff, up until the moment of his discharge, had earnestly complied with all of the Defendants' rules and policies.

16. On Information and belief, the reason given to the Plaintiff for his discharge was pretextual. The Plaintiff was actually discharged because of his national origin, race, and religion.

17. As a result of the aforementioned arbitrary and capricious act of the Defendants, the Plaintiff has suffered grievous harm, including, but not limited to, substantial loss of income and loss of benefits, including loss of health and life insurance policies.

18. The aformentioned acts and omissions by Defendants constitute violation of Plaintiff's rights under Title

VII Civil Rights Act and other laws including laws of the State of Texas.

WHEREFORE, it is respectfully requested that the Court assume jurisdiction herein and thereafter:

A. Declare the conduct of the Defendants to be violative of rights guaranteed to the Plaintiff under appropriate Federal law;

B. Direct the Defendants to reinstate the Plaintiff to his previously held position, with back pay and all other benefits, increments, etc., to which he is entitled;

C. Award the Plaintiff such other and further relief as the Court deems just, reasonable, appropriate, and necessary to correct the illegality and wrong done unto the Plaintiff; and,

D. Award the Plaintiff costs and reasonable attorneys' fees.

Respectfully submitted,

PASTER & ARCHER

By: /s/ Perry Archer
PERRY ARCHER
4409 Montrose, Suite 214
Houston, Texas 77006
713/527-9459
TBA No. 01291000

ATTORNEYS FOR PLAINTIFF
ALI BOURESLAN

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Civil Action No. H-85-3506

ALI BOURESLAN, PLAINTIFF

v.

ARABIAN AMERICAN OIL COMPANY AKA ARAMCO, AND ARAMCO SERVICES COMPANY, DEFENDANTS

[Filed Oct. 30, 1986]

DEFENDANT ARABIAN AMERICAN OIL COMPANY'S MOTION TO DISMISS

TO THE HONORABLE JUDGE OF SAID COURT:

Arabian American Oil Company ("Aramco"), one of the Defendants in the above-captioned and numbered action, submits this its Motion to Dismiss pursuant to Rule 12(b)(1) and 12(h)(3) of the Federal Rules of Civil Procedure, and would respectfully show the following:

1. Plaintiff alleges that the terms of his employment by defendant in the Kingdom of Saudi Arabia violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e), *et seq.*, and other laws of the United States and the State of Texas.

2. Plaintiff's employment with Aramco was performed and terminated exclusively within the Kingdom of Saudi Arabia.

3. Plaintiff's claim under Title VII must be dismissed because Title VII does not have extraterritorial effect, and thus does not apply to Plaintiff's employment in Saudi Arabia.

4. The Labor and Workmen Law of the Kingdom of Saudi Arabia applies to all employment within Saudi Arabia, and application of Title VII in this case would unduly infringe on the sovereign right of the Kingdom of Saudi Arabia to regulate employment within its borders.

5. Upon dismissal of Plaintiff's federal claim for lack of subject matter jurisdiction, Plaintiff's pendent state law claims must also be dismissed.

6. Plaintiff's claim for relief under "other laws of the United States" must be dismissed because Plaintiff fails to state the basis for this court's subject matter jurisdiction of such nebulous claims.

WHEREFORE, PREMISES CONSIDERED, Defendant Aramco respectfully prays that Plaintiff's action be dismissed in its entirety, with prejudice, that judgment be entered in favor of Aramco and against Plaintiff; that Plaintiff take nothing; and that Defendant Aramco have such other and further relief, including attorney's fees, to which it may show itself justly entitled.

Respectfully submitted,

HUTCHESON & GRUNDY

By: /s/ MARK A. BRAND

Mark A. Brand
3300 Citicorp Center
1200 Smith Street
Houston, Texas 77002
(713) 951-2800

ATTORNEY IN CHARGE
FOR DEFENDANT,
ARABIAN AMERICAN OIL COMPANY

Of Counsel:

HUTCHESON & GRUNDY
3300 Citicorp Center
1200 Smith Street
Houston, Texas 77002
(713) 951-2800

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Civil Action No. H-85-3506

ALI BOURESLAN, PLAINTIFF

v.

ARABIAN AMERICAN OIL COMPANY AKA ARAMCO, AND
ARAMCO SERVICES COMPANY, DEFENDANTS

[Filed Oct. 30, 1986]

DEFENDANT ARAMCO SERVICES COMPANY'S MOTION TO DISMISS

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW Aramco Services Company ("ASC"), one of the Defendants in the above-styled and numbered action, and files this its Motion to Dismiss pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure. In support of this motion, ASC will show the Court the following:

I.

Plaintiff alleges that he was terminated in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. Section 2000e, *et seq.*, on the basis of race, national origin and religion.

II.

At the time of his termination, Plaintiff was employed by Defendant Arabian American Oil Company, not Defendant ASC.

III.

Pursuant to the provisions of Rule 12(b)(1) of the Federal Rules of Civil Procedure, this Court lacks jurisdiction over the subject matter, and therefore Plaintiff's claim against Defendant ASC should be dismissed with prejudice.

IV.

Pursuant to the provisions of Rule 12(b)(6) of the Federal Rules of Civil Procedure, Plaintiff's claim against Defendant ASC should be dismissed with prejudice for failure to state a claim upon which relief can be granted.

V.

Defendant ASC has filed a Memorandum of Law which outlines the authorities and arguments in support of this Motion to Dismiss.

WHEREFORE, PREMISES CONSIDERED, Defendant ASC respectfully prays that Plaintiff's action be dismissed in its entirety, with prejudice, that judgment be entered in favor of Defendant ASC and against Plaintiff, that Plaintiff take nothing and that Defendant ASC have

such other and further relief, including attorney's fees, to which it may show itself justly entitled.

Respectfully submitted,

/s/ MARK A. BRAND

Mark A. Brand
3300 Citicorp Center
1200 Smith Street
Houston, Texas 77002
(713) 951-2800

ATTORNEY-IN-CHARGE FOR DEFENDANTS

Of Counsel:

HUTCHESON & GRUNDY
3300 Citicorp Center
1200 Smith Street
Houston, Texas 77002
(713) 951-2800

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Civil Action No. H-84-3506

ALI BOURESLAN, PLAINTIFF

v.

ARABIAN AMERICAN OIL COMPANY AKA ARAMCO, AND ARAMCO SERVICES COMPANY, DEFENDANTS

[Filed Oct. 30, 1986]

DEFENDANT ARAMCO SERVICES COMPANY'S SECOND MOTION TO DISMISS

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW Aramco Services Company ("ASC"), one of the Defendants in the above-styled and numbered action, and files this its Motion to Dismiss pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure. In support of this motion, ASC will show the Court the following:

I.

Plaintiff alleges that he was terminated in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. Section 2000e, *et seq.*, on the basis of race, national origin and religion.

II.

On or about October 26, 1984, Plaintiff filed a discrimination charge against Defendant Arabian American Oil Company ("Aramco"). On or about February 8, 1985, Plaintiff filed a second discrimination charge against Aramco. Plaintiff failed to file a discrimination charge against ASC.

III.

Plaintiff's Title VII claim against ASC should be dismissed because the Court lacks jurisdiction over the subject matter.

IV.

Plaintiff has failed to exhaust his administrative remedies under Title VII and, therefore, Plaintiff's claim against ASC should be dismissed with prejudice.

V.

Plaintiff's claim against ASC is barred by the applicable statute of limitations, laches and/or waiver.

VI.

ASC has filed a memorandum of law which outlines the authorities and arguments in support of this Motion to Dismiss.

WHEREFORE, PREMISES CONSIDERED, Defendant ASC respectfully prays that Plaintiff's action be dismissed in its entirety, with prejudice, that judgment be entered in favor of Defendant ASC and against Plaintiff, that Plaintiff take nothing and that Defendant ASC have

such other and further relief, including attorney's fees, to which it may show itself justly entitled.

Respectfully submitted,

/s/ MARK A. BRAND
Mark A. Brand
3300 Citicorp Center
1200 Smith Street
Houston, Texas 77002
(713) 951-2800
ATTORNEY-IN-CHARGE FOR DEFENDANTS

Of Counsel:

HUTCHESON & GRUNDY
3300 Citicorp Center
1200 Smith Street
Houston, Texas 77002
(713) 951-2800

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Civil Action No. H-85-3506

ALI BOURESLAN, PLAINTIFF

v.

ARABIAN AMERICAN OIL COMPANY AKA ARAMCO AND
ARAMCO SERVICES COMPANY, DEFENDANTS

[Filed Oct. 30, 1986]

COMPLAINT: DISCRIMINATION

AFFIDAVIT OF MOHAMMED SAEED AL-ALI

Mohammed Saeed Al-Ali, being duly sworn, deposes and says:

(1) I am the Manager of the Industrial Relations Department of Aramco Services Company ("ASC"), a Defendant in this action. I have reviewed the Complaint filed herein by Ali Boureslan on June 20, 1985 and I have reviewed ASC's Motion to Dismiss. I submit this Affidavit in support of ASC's Motion to Dismiss Plaintiff's Complaint against ASC. The statements contained in this affidavit are based upon my personal knowiedge and a review of ASC corporate documents and records.

(2) ASC is a corporation incorporated in the State of Delaware with its principal place of business in Houston, Harris County, Texas. ASC is licensed to do business in Texas.

(3) The Arabian American Oil Company ("ARAMCO") is a corporation incorporated in the State of Delaware with its principal place of business in Dhahran, Saudi Arabia. ARAMCO is licensed to do business in Texas, but maintains no permanent office or place of business within the State of Texas.

(4) ASC's records reflect that Ali Boureslan was hired by ASC on July 16, 1979. Ali Boureslan was employed by ASC and worked for ASC in Houston, Texas. Ali Boureslan's last day of work for ASC was November 10, 1980 and ASC's records further reflect that Ali Boureslan has not worked for ASC at any time since November 10, 1980. As a result of Ali Boureslan's request to transfer to ARAMCO in Saudi Arabia and ARAMCO's agreement to employ him, Ali Boureslan was employed by ARAMCO in Saudi Arabia, beginning November 11, 1980 until his termination by ARAMCO in Saudi Arabia on June 16, 1984.

(5) ASC has had no connection or involvement with the work of Ali Boureslan for ARAMCO in Saudi Arabia, nor with the termination of Ali Boureslan's employment with ARAMCO there.

(6) During the period of ASC's employment of Ali Boureslan from July 16, 1979 to November 10, 1980, ASC has no record of any complaints of any kind lodged or filed by Ali Boureslan concerning his employment by ASC.

(7) No Charge of Discrimination against ASC by Ali Boureslan under Title VII or under any laws of the State of Texas or other laws of the United States has been filed with the Equal Employment Opportunity Commission or

with the Texas Commission on Human Rights and no such Charge has ever been served on ASC.

FURTHER, AFFIANT SAYETH NAUGHT.

/s/ MOHAMMED SAEED AL-ALI,
Mohammed Saeed Al-Ali,
Manager
Industrial Relations Dept.
Aramco Services Company

STATE OF TEXAS
COUNTY OF HARRIS

Sworn to and subscribed before me, the undersigned authority, on this the 30th day of October 1986.

/s/ Colleen M. Keller
Notary Public in and for
Harris County, Texas

COLLEN M. KELLER
Notary Public, State of Texas
My Commission Expires 12-20-88

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Civil Action No. H-85-3506

ALI BOURESLAN, PLAINTIFF

v.

ARABIAN AMERICAN OIL COMPANY AKA ARAMCO AND ARAMCO SERVICES COMPANY, DEFENDANTS

[Filed Nov. 14, 1986]

COMPLAINT: DISCRIMINATION

DHAHRAN)
)
KINGDOM OF SAUDI ARABIA)

Before me, the undersigned authority, on this 29th day of October 1986 personally appeared Ahmed S. Humaid, Vice President of the Arabian American Oil Company who, upon first being duly sworn did depose and say:

1. I am Vice President of the Arabian American Oil Company and have been employed by the Arabian American Oil Company in various capacities since 1952.

2. I have been advised of the facts stated in the Arabian American Oil Company's Motion to Dismiss and Memorandum of Authorities in support thereof in Civil

Action No. H-85-3506. These facts of which I have been advised are true and correct according to the best of my personal knowledge, information and belief.

3. I have personal knowledge of the facts set forth in the within affidavit.

4. The Arabian American Oil Company in incorporated in the state of Delaware and has its principal place of business and business headquarters in Dhahran, Saudi Arabia.

5. The Arabian American Oil Company has one office in the United States located at 1667 K Street, N.W., Suite 1200, Washington DC 20006. That office is maintained for the limited purpose of maintaining continuing relations and exchanging information with the United States Department of State, other federal agencies, diplomatic missions and certain public and private educational and international organizations.

6. The Arabian American Oil Company is engaged in the business of exploring for, producing and refining oil and gas exclusively within the Kingdom of Saudi Arabia including its territorial waters. All of the Arabian American Oil Company's products are sold only within the Kingdom of Saudi Arabia and the Arabian American Oil Company does not market or distribute any products in the United States nor does it explore for, produce or refine oil and gas anywhere in the United States.

7. Arabian American Oil Company's assets are beneficially owned by the Kingdom of Saudi Arabia.

8. The Saudi Arab Government has charged Arabian American Oil Company with primary responsibility for the development of Saudi Arabia's fossil fuel resources.

9. The employment relationship between Ali Boureslan and the Arabian American Oil Company was solely performed and was terminated exclusively within the Kingdom of Saudi Arabia.

FURTHER, AFFIANT SAYETH NAUGHT.

Kingdom of Saudi Arabia)
Eastern Province)
Town of Dhahran)
Consulate General of the)
United States of America)

/s/ Ahmed S. Humaid
AHMED S. HUMAID
Vice President
Arabian American Oil Company

Sworn to and subscribed before me, the undersigned authority, on this the 29th day of October 1986.

/s/ Eric M. Maestas
Vice Consul of the
United States of America

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Civil Action No. H-85-3506

ALI BOURESLAN, PLAINTIFF

v.

ARABIAN AMERICAN OIL COMPANY AKA ARAMCO AND
ARAMCO SERVICES COMPANY, DEFENDANTS

[Filed Nov. 14, 1986]

COMPLAINT: DISCRIMINATION

DECLARATION OF ISMAIL S. NAZER

I, ISMAIL S. NAZER, hereby declare:

1. I am an attorney at law duly licensed to practice in the Kingdom of Saudi Arabia. I have personal knowledge of the matters set forth herein and, if called upon, could competently testify thereto. I speak, read, and understand English and Arabic.

2. I have been engaged in the practice of law in the Courts of Saudi Arabia since 1952. My main office is located in Al Khobar, with branches in Damman and Riyadh, Saudi Arabia. I received my LL.B. from Kings College, London University, in 1950. In 1951, I was admitted to the English Bar (the Inns of Court of London).

I was admitted to the practice of law in the Kingdom of Jordan in 1952. I have been regularly engaged in the practice of law in the Courts of the Kingdom of Saudi Arabia since 1952, including before the Commissions which administer the Labor and Workmen Law of 1969 discussed below. My license is No. 5.

3. I am fully familiar with the laws and regulations of the Kingdom of Saudi Arabia. On numerous occasions I have lectured and published articles on the laws of the Kingdom of Saudi Arabia and on Islamic law. The Kingdom of Saudi Arabia has an extensive code, the Labor and Workmen Law of 1969, which regulates all employment within its borders, including that of citizens of foreign countries. This Code contains numerous substantive provisions and a procedural framework consisting of two judicial commissions by which aggrieved persons may vindicate their rights under the code. These commissions make no distinction between citizens of Saudi Arabia and foreign nationals who work in Saudi Arabia.

4. The Labor and Workmen Law represents a careful balancing of Saudi Arabia's desire to modernize its economy and commercial relations and Saudi Arabia's desire to maintain its system of Islamic moral, ethical, social and legal conduct. The general law of Saudi Arabia is the law of Islam, known as the "Shari'a." The Shari'a is predicated upon the principle that its laws are divine in origin. The chief source of the Shari'a is the Koran, which is accepted as the word of God as revealed to the prophet Muhammad by the angel Gabriel in the 7th century A.D. The Koran establishes general principles which govern both secular and religious life, together with specific provisions which regulate every day conduct. The Labor and Workmen Law is designed to provide realistic rules and procedures in an era of modern technology and commerce

while at the same time respecting the principles of Islam and its jurisprudence.

I declare under penalty of perjury under the laws of the United States of America and pursuant to 28 U.S.C. Section 1746(1) that the foregoing is true and correct.

Executed on 29th October 1986 at Dhahran, Saudi Arabia.

Kingdom of Saudi Arabia)
Eastern Province)
Town of Dhahran)
Consulate General of the)
United States of America)

/s/ Ismail S. Nazer
ISMAIL S. NAZER

SUBSCRIBED AND SWORN TO BEFORE ME THIS 29TH, DAY OF OCTOBER 1986 BY ISMAIL S. NAZER, ONLY

/s/ Eric M. Maestas
ERIC M. MAESTAS
Vice Consul of the
United States of America

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Civil Action No. H-85-3506

ALI BOURESLAN

v.

ARAMCO, ARABIAN AMERICAN OIL COMPANY, AND ARAMCO SERVICES COMPANY

[Filed Nov. 28, 1986]

JOINT PRETRIAL ORDER

The parties, through counsel, request the entry of this Joint Pretrial Order in accordance with the provisions of Rule 16 of the Federal Rules of Civil Procedure and the local rules of this court.

Appearance of Counsel

Plaintiff, Ali Boureslan, is represented by Perry Archer, Paster & Archer, 4409 Montrose, Suite 214, Houston, TX 77006. Telephone: (713)-527-9459.

Defendants, Arabian American Oil Company ("Aramco") Aramco Services Company, ("ASC") are represented by Linda Ottinger Headley, Hutcheson & Grundy, 3300 Citicorp Center, 1200 Smith Street, Houston, TX 77006. Telephone: (713)-951-2891.

Statement of the Case

Plaintiff files this suit pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e) and other applicable laws of the State of Texas. Plaintiff alleges that he was mistreated by an Aramco supervisor because of his national origin, race and religion. Plaintiff further alleges that he was terminated from his employment in June 1984 because of his national origin, race and religion.

Defendants deny these claims and maintain that Plaintiff was terminated for legitimate business reasons. Defendant ASC states that this court lacks jurisdiction over the subject matter of this action under Title VII of the Civil Rights Act, 42 U.S.C. § 2000(e) et seq. because Plaintiff failed to exhaust his administrative remedies in that Defendant ASC was not named in Plaintiff's charge filed with the EEOC. Defendant ASC states further that this Court lacks jurisdiction under Title VII because Plaintiff was not an employee of ASC during the relevant time complained of by Plaintiff. Defendant Aramco states that this court lacks jurisdiction over the subject matter in that there is no extraterritorial jurisdiction under Title VII regarding employment in Saudi Arabia.

Jurisdiction

Plaintiff asserts that this Court has jurisdiction by virtue of the fact that this case is brought pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C., § 2000(e).

Jurisdiction of this Court to hear Plaintiff's claims based on discrimination is contested by Defendant as addressed in Defendants' pending motions and as set forth above in statement of the case.

Motions

There are currently four motions pending before the court in this case:

1. Defendant Aramco's Motion to Dismiss on the ground that Title VII has no extraterritorial effect.
2. Defendant ASC's Motion to Dismiss on the ground that Plaintiff was not an employee of Defendant ASC.
3. Defendant ASC's Second Motion to Dismiss on the ground that Plaintiff failed to exhaust administrative remedies as to Defendant ASC.
4. Defendants' Motion for Expedited Hearing on the foregoing motions.

Plaintiff, through counsel, has responded to the motions to dismiss. The motions and responses are presently scheduled to be considered by the court on December 10, 1986.

Contentions of the Parties

A. *Plaintiff's Contentions*

Plaintiff claims that on or about July of 1979, he began working for Aramco Services Company, having been hired in Texas. On or about November of 1980, he was transferred to Arabian American Oil Company in Saudi Arabia. His duties were those of an engineer and he performed them in satisfactory fashion from the beginning until the end of his employment. In September of 1982, Plaintiff's supervisor, George Thomson-Moore, began to mistreat and harass Plaintiff systematically concerning his national origin, race, and religion. This mistreatment and harassment began following disputes and arguments about Plaintiff's national origin, race, and religion. This mistreatment and harassment continued, and Plaintiff complained to his superiors but was ignored at first. In

February of 1983, he filed a formal grievance which resulted in apologies for the insults as to his national origin, race, and religion. His religion was Moslem. However, Plaintiff was told that racial, religious, and national origin harassment were personal matters between him and his supervisor and had nothing to do with his employer.

Until 1982, Defendants' evaluations of Plaintiff's performance were satisfactory or better; however, in early 1982, as a result of Plaintiff's conflicts with his supervisor about national origin, race, and religion and as a result of his complaints about the harassment, the supervisor set out to create a record that would justify firing Plaintiff and this was subsequently carried out on June 16, 1984. Plaintiff's salary at the time was $4,114.00 a month, and added to income tax benefits come to $52,000.00 a year. Plaintiff believes that the reasons for his discharge were pretextual and that he was discharged because of his national origin, race, and religion, and his unwillingness to accept the insults of Defendants' supervisory employees.

B. ***Defendants' Contentions***

Defendants deny the validity of Plaintiff's assertions and contend that Plaintiff has not stated a claim under Title VII, 42 U.S.C.A. § 2000(e) for which this court can grant relief.

The Plaintiff was not discriminated against in his employment with Defendant Aramco because of his national origin, race or religion or for any other actionable reason.

Plaintiff was employed by Aramco Services Company in July 1979 to work in Houston, Texas. In February 1980, Plaintiff requested a transfer to work for Defendant Aramco in Saudi Arabia. Plaintiff began work for Defendant Aramco in Saudi Arabia in November 1980.

Plaintiff filed a grievance complaining of mistreatment by his immediate supervisor. Plaintiff's grievance was the first notification to Aramco management of Plaintiff's allegations of employment discrimination. Defendant Aramco responded to Plaintiff's grievance by disciplining and demoting the supervisor to a point that the supervisor ultimately resigned. Based upon a review of Plaintiff's work, and with Plaintiff's agreement, Defendant Aramco transferred Plaintiff to provide Plaintiff with the opportunity to correct the problems with his work performance. Plaintiff was transferred to an Engineering III position with assignment of certain structural engineering responsibilities to allow Plaintiff to take advantage of his advanced degree in structural engineering.

Plaintiff was surplussed from employment with Aramco as part of a general manpower control reduction. Plaintiff's layoff was determined by his performance level which was based on several evaluations of Plaintiff's work. Such evaluations, by various supervisors, were an accurate reflection of Plaintiff's poor work performance. Plaintiff's salary at the time of his termination was $3,025.00 per month, with an annual salary of $36,300.00. Plaintiff's receipt of other money was solely due to his expatriate employment in Saudi Arabia and the corresponding company benefits. These additional payments were not salary.

Defendants further contend that Plaintiff is unable to show that the Defendants' legitimate, non-discriminatory business reasons for terminating Plaintiff were pretextual.

Admissions of Fact

It is anticipated that the following facts will require no proof at the time of trial:

1. Plaintiff was employed by Aramco Services Company in July, 1979 as a cost engineer.

2. Plaintiff was not harassed or mistreated while employed by ASC in the United States.
3. In February 1980, Plaintiff requested a transfer to work for Defendant Aramco in Saudi Arabia.
4. Plaintiff was transferred to and employed by Aramco in November, 1980 for assignment as a cost engineer in Saudi Arabia, and thereafter worked for Aramco in Saudi Arabia.
5. In February 1981 Plaintiff was assigned to be a construction engineer in Saudi Arabia.
6. Plaintiff's employment with Defendant Aramco in Saudi Arabia was terminated on June 16, 1984.
7. Plaintiff filed a grievance pertaining to Plaintiff's alleged mistreatment and harassment on the job by his direct supervisor at the time, Mr. George Thomson-Moore.
8. Plaintiff was subsequently transferred to work with the design group.
9. After the transfer described in No. 8, Plaintiff no longer reported to Mr. George Thomson-Moore.
10. While employed with the design group, Plaintiff's supervisors were H.A. Roos and Dan Christy, respectively.

Joint Contested Issues of Fact

The following are contested issues of fact:

1. Whether Plaintiff was an employee of Defendant Aramco Services Company when he worked as an engineer in Saudi Arabia.
2. Whether other employees of Aramco with better evaluation ratings than Plaintiff were surplussed before or at the same time as Plaintiff.

3. Whether Plaintiff's evaluation ratings were an accurate reflection of Plaintiff's work performance.
4. Whether Plaintiff's evaluation ratings were based on discriminatory reasons.
5. Whether Plaintiff was the subject of harassment in his employment by Defendant Aramco because of his national origin, race and religion.
6. If the answer to the preceding issue is in the affirmative, whether Defendant Aramco remedied such harassment by its actions in disciplining the supervisor complained of and transferring Plaintiff to another position.
7. If the answer to issue number 5 is in the affirmative, whether such harassment ultimately caused Plaintiff's discharge.
8. Whether Defendant Aramco disciplined Mr. George Thomson-Moore as a result of Plaintiff's grievance.
9. Whether Defendant Aramco knew of the alleged harassment of Plaintiff by his supervisor, Mr. Thomson-Moore prior to Plaintiff's initiating a grievance based on the alleged harassment.
10. Whether Defendant Aramco took corrective action after Plaintiff filed his grievance.
11. Whether Plaintiff was terminated by Defendant because of his national origin, race and religion.
12. Whether the Defendants' legitimate, non-discriminatory reason for terminating the Plaintiff was a pretext.
13. Whether Plaintiff is entitled to lost wages and benefits under Title VII of the Civil Rights Act of 1964, as amended, and if so the amount of such wages and benefits.

14. The amount of attorneys' fees to be recovered by Plaintiff's counsel in this matter.
15. Whether Plaintiff has mitigated his alleged damages.
16. Whether Plaintiff's lawsuit against Defendants was frivolous, vexatious, and/or without foundation.
17. If the answer to the preceding issue is in the affirmative, then the amount of any attorneys' fees to be recovered from Plaintiff and Plaintiff's counsel in this case by Defendants.

Agreed Propositions of Law

1. In a discrimination case under Title VII, Plaintiff has the initial burden of proving a prima facia case by a preponderance of the evidence. Once Plaintiff makes a prima facia showing, the Defendant has the burden of going forward with legitimate, non-discriminatory reasons for its actions. Should the Defendant carry his burden, the Plaintiff must then prove by a preponderance of the evidence that the legitimate reasons offered by the Defendant are actually a pretext for discrimination. The ultimate burden of persuasion remains at all times with the Plaintiff.

2. In a discrimination case, a prevailing Plaintiff is entitled to recover back pay, fringe benefits and reasonable attorneys' fees and costs. Back pay is measured by the difference between the salary or compensation an employee would have received but for the violation of the Act and the salary and compensation actually received. The relevant time period for measuring back pay begins from the time of discharge, which constitutes a violation through time of trial.

3. In a discrimination action the Plaintiff may seek reinstatement to his employment from which he was discharged.

4. If Plaintiff was not an employee of Aramco Services Company during the time of the acts complained of, this court does not have subject matter jurisdiction over Defendant ASC.

Joint Contested Issues of Law

1. Whether this court has jurisdiction over Plaintiff's discrimination claims under 42 U.S.C.A. § 2000(e) et seq. based on extraterritorial jurisdiction under Title VII.

2. Whether Defendants have presented a legitimate, non-discriminatory business reason for Plaintiff's discharge.

3. Whether the Plaintiff exhausted his administrative remedies as to Aramco Services Company.

4. Whether Defendant Aramco has liability for the alleged harassment of Plaintiff by his immediate supervisor, if Defendant Aramco was unaware of such harassment.

5. Whether the alleged harassment of Plaintiff by his supervisor, Mr. Thomson-Moore, would, if true, have affected a term, condition or privilege of employment within the meaning of Title VII.

6. Whether and to what extent Plaintiff is entitled to backpay and lost fringe benefits.

7. Whether and to what extent Plaintiff is entitled to recover front pay and future fringe benefits.

8. Whether and to what extent the Defendant is entitled to attorneys' fees and court costs.

9. Whether Plaintiff is entitled to reinstatement.

Exhibits

1. Counsel will provide at least two (2) copies of the list of all exhibits to be offered, excluding rebuttal exhibits, and will make all such exhibits available for examination by opposing counsel no later than December 1, 1986 or at least two (2) weeks prior to the trial of this case, if the trial setting of December 15, 1986 is continued. Each counsel will mark all exhibits to be offered and will list then on the standard form. All documentary exhibits will be exchanged prior to trial, except rebuttal exhibits which cannot be anticipated.

2. Any counsel requiring authentication of an exhibit must notify the offering counsel within five (5) days after the exhibit is made available. Failure to do so is an admission of authenticity.

3. Any other objections to admissibility of exhibits, where possible, must be made at least three business days before trial. The judge will be notified in writing with copies to all counsel accompanied by supporting legal authorities and copies of the exhibits in dispute.

4. All exhibits will be offered and received into evidence as the first item of business at the trial.

Witnesses

Each party has attached hereto two copies of a witness list containing the name of the witness who will or may be used by such party with a brief statement of the subject matter and substance of the testimony of each witness.

In the event there are any other witnesses to be called at the trial, their names and subject matter of their testimony shall be reported to opposing counsel as soon as they are known. This restriction shall not apply to rebuttal or impeaching witnesses, the necessity of whose testimony cannot reasonably be anticipated before the time of trial.

Settlement

This case cannot be settled and will have to be tried.

Trial

The trial of this case will take approximately three to four days.

Plaintiff's witnesses are available as far as counsel for Plaintiff knows at this time.

All witnesses for Defendants will be available with one week and one days' notice. The majority of Defendants' witnesses need to travel from Saudi Arabia. In order to obtain a travel visa from Saudi Arabia the Defense witnesses must receive notice of trial no later than the Friday of the week preceding the week before trial.

Attachments

Each party has attached their witness list.

Plaintiff and Defendants will provide the following items at least two weeks prior to the time of trial:

1. Exhibit List:
2. Proposed Conclusions of Law and Findings of Fact; and
3. Memorandum of Authorities

APPROVED and signed at Houston, Texas this ____ day of November, 1986

_____

United States District Judge

APPROVAL RECOMMENDED:

By: /s/ PERRY ARCHER (by LDH with permission)
Perry Archer
Attorney in Charge for Plaintiff

Date: 11/25/86

By: /s/ LINDA O. HEADLEY
Linda Ottinger Headley
Attorney in Charge for
Defendants

Date: November 25, 1986

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS

[Filed Dec. 10, 1986]

AFFIDAVIT

STATE OF TEXAS

COUNTY OF HARRIS

Before me, the undersigned authority, on this day personally appeared affiant, who being duly sworn by me on oath stated as follows;

My name is Seth L. Sharr and I am employed by Aramco Services Company ("ASC") as the Vice President, Technical Services. I have personal knowledge of the following facts.

1. ASC is a Delaware corporation with its principal place of business in Houston, Texas. ASC does not have any facilities or operations in Saudi Arabia, nor are there any ASC employees permanently assigned in Saudi Arabia.

2. ASC performs contractual services for the Arabian American Oil Company ("Aramco") pursuant to a contract with Aramco. ASC is compensated for these contractual servies by Aramco.

3. ASC owns and maintains offices at 9009 West Loop South in Houston, Texas. ASC and Aramco do not share any office facilities. Aramco's principal offices are in Saudi Arabia.

4. All of the shares of stock of Aramco are owned by Texaco, Exxon, Mobil and Chevron, or their subsidiaries. Aramco holds all the stock of ASC.

5. ASC and Aramco have no common corporate officers, directors, supervisors or management employees. ASC has separate corporate meetings, minutes and resolutions from Aramco. ASC does not issue policy manuals or directives to Aramco.

6. ASC maintains and controls its own bank accounts. ASC makes purchases, obtains credit, and has its own payroll independent from the Aramco payroll. ASC has no responsibility for the debts or other obligations of Aramco and Aramco is not responsible for any debts or other obligations of ASC.

7. ASC participates in a Retirement Income Plan, Savings Plan and other employee benefit plans, some of which are administered by Aramco or through committees located in Dhahran, Saudi Arabia. The eligibility of ASC employees for the benefit plans is determined separately by ASC for its own employees.

8. ASC does not share telephone or telex numbers with Aramco. ASC owns and maintains its own diverse equipment in the United States. ASC maintains its own separate accounting records, financial statements, budgets, billings, bank accounts, lines of credit, and payroll accounts. ASC prepares its own payroll. ASC files separate corporate tax returns from Aramco.

9. ASC has its own Employee Relations Manual independent from Aramco's Employee Relations Manual. ASC maintains its own payroll account and no employees of ASC are also employees of Aramco. ASC supervises and manages only its own employees, including evaluating, disciplining and handling the grievances of its own employees.

10. When an ASC employee transfers to work for Aramco, it is a permanent transfer and the employment relationship with ASC is terminated. ASC had no involvement in any decisions regarding employment matters related to Ali Boureslan's employment by Aramco in Saudi Arabia.

/s/ SETH L. SHARR
Seth L. Sharr

SWORN TO AND SUBSCRIBED before me, the undersigned authority by SETH L. SHARR on this the 9th day of December 1986.

/s/ Colleen M. Keller
Notary Public in and for
Harris County, Texas

COLLEN M. KELLER
Notary Public, State of Texas
My Commission Expires 12-20-88

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Civil Action No. H-85-3506

ALI BOURESLAN

v.

ARAMCO, ARABIAN AMERICAN OIL COMPANY AND
ARAMCO SERVICES COMPANY

FINAL JUDGMENT

Pursuant to the Court's Memorandum and Order filed in the above-referenced cause on this date, final judgment is hereby entered for DEFENDANTS Arabian American Oil Company and Aramco Services Company.

This is a Final Judgment.

DONE in Houston, Texas, this 27th day of January, 1987.

/s/ JAMES DEANDA
James DeAnda
United States District Judge

TITLE 29 – LABOR

Chapter XIV – Equal Employment Opportunity Commission

PART 1606 – GUIDELINES ON DISCRIMINATION BECAUSE OF NATIONAL ORIGIN

By virtue of the authority vested in it by section 713(b) of the Act, 42 U.S.C. section 2000e-12(b), the Commission hereby issues Title 29, Chapter XIV, § 1606.1 in the Code of the Federal Regulations.

Because the provisions of the Administrative Procedure Act (5 U.S.C. 1003) requiring notice of proposed rule making, opportunity for public participation, and delay in effective date, are inapplicable to these interpretative rules, the guideline shall become effective immediately and shall be applicable with respect to charges presently before or hereafter filed with the Commission.

§ 1601. Guidelines on discrimination because of national origin.

(a) The Commission is aware of the widespread practices of discrimination on the basis of national origin, and intends to apply the full force of law to eliminate such discrimination. The bona fide occupational qualification exception as it pertains to national origin cases shall be strictly construed.

(b) Title VII is intended to eliminate covert as well as the overt practices of discrimination, and the Commission will, therefore, examine with particular concern cases where persons within the jurisdiction of the Commission have been denied equal employment opportunity for reasons which are grounded in national origin considerations. Examples of cases of this character which have come to the attention of the Commission include: The use of tests in the English language where the individual tested came from circumstances where English was not that person's first language or mother tongue, and where English

language skill is not a requirement of the work to be performed; denial of equal opportunity to persons married to or associated with persons of a specific national origin; denial of equal opportunity because of membership in lawful organizations identified with or seeking to promote the interests of national groups; denial of equal opportunity because of attendance at school or churches commonly utilized by persons of a given national origin; denial of equal opportunity because their name or that of their spouse reflects a certain national origin, and denial of equal opportunity to persons who as a class of persons tend to fall outside national norms for height and weight where such height and weight specifications are not necessary for the performance of the work involved.

(c) Title VII of the Civil Rights Act of 1964 protects all individuals, both citizen and noncitizens, domiciled or residing in the United States, against discrimination on the basis of race, color, religion, sex, or national origin.

(d) Because discrimination on the basis of citizenship has the effect of discriminating on the basis of national origin, a lawfully immigrated alien who is domiciled or residing in this country may not be discriminated against on the basis of his citizenship, except that it is not an unlawful employment practice for an employer, pursuant to section 703(g), to refuse to employ any person who does not fulfill the requirements imposed in the interests of national security pursuant to any statute of the United States or any Executive order of the President respecting the particular position or the particular premises in question.

(e) In addition, some States have enacted laws prohibiting the employment of noncitizens. For the reasons stated above such laws are in conflict with and are, therefore, superseded by Title VII of the Civil Rights Act of 1964.

(Sec. 713. 78 Stat. 265, 42 U.S.C., sec. 2000e-12)

This guideline is effective upon publication.

Signed at Washington, D.C., this the 7th day of January 1970.

[SEAL]

WILLIAM H. BROWN, III,
Chairman.

[F.R. Doc. 70-447; Filed, Jan. 9, 1970; 11:54 a.m.)

14 MAR 1975

Senator Frank Church
Attn: Jeffery Shields
Sub-Committee on Multi-National Corp.
Senate Foreign Relations Committee
U.S. Senate
Washington, D.C. 20510

Dear Senator Church:

The following is in response to a telephone request from Mr. Jeffery Shields, March 14, 1975, concerning whether Title VII of the Civil Rights Act of 1964, as amended, was applicable to American companies operating overseas with respect to American employees of such overseas operations.

The Supreme Court has clearly stated that Congress has the power to enact legislation which has extraterritorial effect, see *Blackner* v. *U.S.*, 248 U.S. 421, 52 S. Ct. 252 (1932). Whether a particular statute does operate extraterritorially depends on the intent of Congress in enacting the legislation. The language of Title VII indicates a Congressional intent to make the Title applicable to American citizens employed by American companies operating overseas.

Section 703 provides that it is unlawful to discriminate against "any individual" with respect to his employment. The section, in defining what kinds of discrimination are prohibited, constantly uses the term "any individual." The only exception to "any individual" appears to be that contained in Section 702, i.e., aliens working outside the U.S. and to employees of certain religious and educational institutions.

Giving Section 702 its normal meaning would indicate a Congressional intent to exclude from the coverage of the

statute aliens employed by covered employers working in the employers' operations outside of the United States.

The reason for such exclusions is obvious; employment conditions in foreign countries are beyond the control of Congress. The section does not similarly exempt from the provisions of the Act, U.S. Citizens employed abroad by U.S. employers. If Section 702 is to have any meaning at all, therefore, it is necessary to construe it as expressing a Congressional intent to extend the coverage of Title VII to include employment conditions of citizens in overseas operations of domestic corporations at the same time it excludes aliens of the domestic corporation from the operation of the statute.

This interpretation of Section 702 is consistent with the purpose of the Act, which is remedial, to remove the barriers that have operated in the past to favor certain classes of employees over others, *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 91 S Ct. 849 (1971).

Overseas employment practices of covered employers can have a very substantial impact on the employment opportunities in domestic corporations. Overseas assignment, for example, for a period of time may be very necessary for advancement in domestic operations. Thus, unless the Act is construed to cover employment conditions of American citizens working abroad for U.S. Corporations, employees in the corporation's domestic operations will not be afforded the protection that Title VII was intended to confer. Courts have traditionally construed laws to have extraterritorial effect when the failure to do so would have an adverse domestic impact.

If we can be of any further assistance please do not hesitate to contact us.

Sincerely,

William A. Carey
General Counsel

Supreme Court of the United States

No. 89-1838

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, PETITIONER

v.

ARABIAN AMERICAN OIL COMPANY AND ARAMCO SERVICES COMPANY

ORDER ALLOWING CERTIORARI. Filed October 1, 1990.

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October 1, 1990

Supreme Court of the United States

No. 89-1845

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In the Supreme Court of the United States

OCTOBER TERM, 1990

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, PETITIONER

v.

ARABIAN AMERICAN OIL CO., ET AL.

ALI BOURESLAN, PETITIONER

v.

ARABIAN AMERICAN OIL CO., ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

KENNETH W. STARR
Solicitor General

JOHN R. DUNNE
Assistant Attorney General

JOHN G. ROBERTS, JR.
Deputy Solicitor General

STEPHEN L. NIGHTINGALE
Assistant to the Solicitor General

Department of Justice
Washington, D.C. 20530
(202) 514-2217

DONALD R. LIVINGSTON
Acting General Counsel

GWENDOLYN YOUNG REAMS
Associate General Counsel

VINCENT J. BLACKWOOD
Assistant General Counsel

SAMUEL A. MARCOSSON
Attorney

Equal Employment Opportunity Commission
Washington, D.C. 20507

43 pp

QUESTION PRESENTED

Whether Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, prohibits employment discrimination outside the United States by an American corporation against an American citizen.

PARTIES TO THE PROCEEDING

The Equal Employment Opportunity Commission, which intervened as an appellant in the court of appeals, is the petitioner in No. 89-1838. Ali Boureslan, the plaintiff-appellant below, is the petitioner in No. 89-1845. Arabian American Oil Company and Aramco Services Company, defendants-appellees below, are the respondents in both cases.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statutory provisions involved	2
Statement	2
Summary of argument	5
Argument:	
I. Title VII manifests a clear congressional intention to prohibit discrimination outside the United States by American employers against American citizens	8
A. By its terms, Title VII prohibits invidious employment discrimination against American citizens outside the United States	11
B. Title VII's exemption for aliens with respect to employment outside the United States clearly manifests an intention to protect American citizens with respect to employment outside the United States	12
C. Other provisions of Title VII are consistent with its application to discrimination by American employers against American citizens abroad	18
D. The EEOC, the agency charged with administrative enforcement of Title VII, has interpreted the statute to apply to discrimination against Americans abroad	22
II. Concern for potential conflicts with the laws of other nations does not warrant limiting Title VII to discrimination within the United States	24

		Page
A.	The alien exemption represents Congress's solution to potential conflicts of laws	25
B.	Properly applied, Title VII does not create a serious potential for conflicts with international norms or the laws of foreign states	25
C.	Title VII's treatment of conflicts with state law provides no basis for questioning the extraterritorial application of the statute	29
D.	The 1984 amendments to the ADEA do not justify a distinction between age discrimination and discrimination based upon race, sex, national origin, or religion	31
Conclusion		32

TABLE OF AUTHORITIES

Cases:

Akgun v. *Boeing Co.*, No. C89-1319D (W.D. Wash. June 7, 1990) 14
American Banana Co. v. *United Fruit Co.*, 213 U.S. 347 (1909) 9
Andrus v. *Glover Constr. Co.*, 446 U.S. 608 (1980) 13
Argentine Republic v. *Amerada Hess Shipping Co.*, 109 S. Ct 683 (1989) 9
Arrocha v. *Panama Canal Comm'n*, 609 F. Supp. 231 (E.D.N.Y. 1985) 19
Atascadero State Hosp. v. *Scanlon*, 473 U.S. 234 (1985) 13
Bainbridge v. *Merchants & Miners Transp. Co.*, 287 U.S. 278 (1932) 19
Benz v. *Compania Naviera Hidalgo, S.A.*, 353 U.S. 138 (1958) 18, 24, 25
Blackmer v. *United States*, 284 U.S. 421 (1932) ... 9, 26

Cases – Continued:

Branch v. *FTC*, 141 F.2d 31 (7th Cir. 1944) 12
Brunette Machine Works Ltd. v. *Kockum Indus., Inc.*, 406 U.S. 706 (1972) 19
Bryant v. *International Schools Services, Inc.*, 502 F. Supp. 472 (D.N.J. 1980), rev'd, 675 F.2d 562 (3d Cir. 1982) 14
Cleary v. *United States Lines, Inc.*, 728 F.2d 607 (3d Cir. 1984) 31
CFTC v. *Nahas*, 738 F.2d 487 (D.C. Cir. 1984) ... 20
Cole v. *Secretary of the Army*, EEOC Dec. No. 05890142 (Aug. 23, 1989) 23
Continental Ore Co. v. *Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962) 9
Cunard S.S. Co. v. *Mellon*, 262 U.S. 100 (1923) ... 18
DeYoreo v. *Bell Helicopter Textron, Inc.*, 785 F.2d 1282 (5th Cir. 1986) 31
EEOC v. *Commercial Office Products Co.*, 486 U.S. 107 (1988) 23
EEOC v. *Pacific Press Publishing Ass'n*, 676 F.2d 1272 (9th Cir. 1982) 14
EEOC Dec. No. 85-10, Empl. Prac. Dec. (CCH) ¶ 6851 (July 16, 1985) 27
EEOC Dec. No. 85-16, Empl. Prac. Dec. (CCH) ¶ 6856 (Sept. 16, 1985) 23
Espinoza v. *Farah Mfg. Co.*, 414 U.S. 86 (1973) ... 3, 14
Foley Bros., Inc. v. *Filardo*, 336 U.S. 281 (1949) .. 3, 9, 10, 13, 15, 17, 18, 24
FTC v. *Campagnie de Saint-Gobain-Pont-a-Mousson*, 636 F.2d 1300 (D.C. Cir. 1980) 21
Hedges v. *Department of Defense*, EEOC Dec. No. 05900454 (June 1, 1990) 23
Kern v. *Dynaelectron Corp.*, 577 F. Supp. 1196 (N.D. Tex. 1983), aff'd, 746 F.2d 810 (5th Cir. 1984) 27

Cases – Continued: Page

Lauritzen v. *Larsen*, 345 U.S. 571 (1953) 28, 29
Lopez v. *Pan Am World Services, Inc.*, 813 F.2d 1118 (11th Cir. 1987) 31
Love v. *Pullman Co.*, 13 Fair Empl. Prac. Cas. (BNA) 423 (D. Colo. July 21, 1976), aff'd, 569 F.2d 1074 (10th Cir. 1978) 14
McClure v. Salvation Army, 460 F.2d 553 (5th Cir.), cert. denied, 409 U.S. 896 (1972) 14
McCulloch v. *Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10 (1963) 9, 18, 24, 25, 27, 29
Murray v. *The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804) 28, 29
New York Central R.R. v. *Chisholm*, 268 U.S. 29 (1925) 9
Patterson v. *Bark Eudora*, 190 U.S. 169 (1903) 9, 10
Pennsylvania v. *Union Gas Co.*, 109 S. Ct. 2273 (1990) 13
Pfeiffer v. *William Wrigley Jr. Co.*, 755 F.2d 554 (7th Cir. 1985) 31
Ralis v. *RFE/RL, Inc.*, 770 F.2d 1121 (D.C. Cir. 1985) 31
Romero v. *International Terminal Operating Co.*, 358 U.S. 354 (1959) 28
Sandberg v. *McDonald*, 248 U.S. 185 (1918) 9
Schoenbaum v. *Firstbrook*, 405 F.2d 200, modified, 405 F.2d 215 (2d Cir. 1968), cert. denied, 395 U.S. 906 (1969) 9
Seville v. *Martin Marietta Corp.*, 638 F. Supp. 590 (D. Md. 1986) 14
Skiriotes v. *Florida*, 313 U.S. 69 (1941) 9, 26
Societe Nationale Industrielle Aerospatiale v. *United States District Court*, 482 U.S. 522 (1987) 21
Steele v. *Bulova Watch Co.*, 344 U.S. 280 (1952) .. 9, 10, 12, 24

Cases – Continued: Page

Stewart v. *Pacific Steam Navigation Co.*, 3 F.2d 329 (S.D.N.Y. 1924) 19
Sumitomo Shoji America, Inc. v. *Avagliano*, 457 U.S. 176 (1982) 26
Tamari v. *Bache & Co. (Lebanon) S.A.L.*, 730 F.2d 1103 (7th Cir.), cert. denied, 469 U.S. 871 (1984) 9
Thomas v. *Brown & Root, Inc.*, 745 F.2d 279 (4th Cir. 1984) 31
United States v. *Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945) 28, 29
United States v. *Bowman*, 260 U.S. 94 (1922) 9
United States v. *Flores*, 289 U.S. 137 (1933) 9
United States v. *Palmer*, 16 U.S. (3 Wheat.) 610 (1818) 28
United States v. *Rodgers*, 150 U.S. 249 (1893) 18
Vermilya-Brown Co. v. *Connell*, 335 U.S. 377 (1948) 9, 26
Weinberger v. *Rossi*, 456 U.S. 25 (1982) 29
Yellow Freight System, Inc. v. *Donnelly*, 110 S. Ct. 1566 (1990) 19
Zahourek v. *Arthur Young & Co.*, 750 F.2d 827 (10th Cir. 1984) 31

Constitution, statutes and rule:

U.S. Const:
Amend. XI 13
Act of Sept. 28, 1971, Pub. L. No. 92-129, Tit. I, § 106, 85 Stat. 355 31
Age Discrimination in Employment Act, 29 U.S.C. 630(f) 4
Civil Rights Act of 1964, Pub. L. No. 88-352, Tit. VII, 78 Stat. 253, 42 U.S.C. 2000e *et seq.* 2
§ 701(b), 42 U.S.C. 2000e(b) 11
§ 701(g), 42 U.S.C. 2000e(g) 11

Statutes and rule – Continued: Page

§ 701(h), 42 U.S.C. 2000e(h) 11
§ 702, 42 U.S.C. 2000e-1 (78 Stat. 255) 3, 6, 12
§ 703, 42 U.S.C. 2000e-2 ..... 11, 14, 27
§ 703(a), 42 U.S.C. 2000e-2(a) 11
§ 704, 42 U.S.C. 2000e-3 11
§ 706(a), 42 U.S.C. 2000e-5(a) 21
§ 706(b), 42 U.S.C. 2000e-5(b) 21
§ 706(b)-(d), 42 U.S.C. 2000e-5(b) to 2000e-5(d) 30
§ 706(f), 42 U.S.C. 2000e-5(f) 21
§ 706(f)(1), 42 U.S.C. 2000e-5(f)(1) 3
§ 706(f)(3), 42 U.S.C. 2000e-5(f)(3) 18
§ 708, 42 U.S.C. 2000e-7 30
§ 709, 42 U.S.C. 2000e-8 21
§ 709(b), 42 U.S.C. 2000e-8(b) 30
§ 710, 42 U.S.C. 2000e-9 ..... 20, 22
§ 710(a), 42 U.S.C. 2000e-9(a) (78 Stat. 264) .. 20
§ 717, 42 U.S.C. 2000e-16 23

Outer Continental Shelf Lands Act, 43 U.S.C. 1331 *et seq.* 8
15 U.S.C. 78s(b) 22
28 U.S.C. 1783 21
29 U.S.C. 161(1) 20, 22
46 U.S.C. 688 19
50 U.S.C. App. 2407 32
Fed. R. Civ. P. 45 21

Miscellaneous:

Age Discrimination and Overseas Americans, 1983: Hearing Before the Subcomm. on Aging of the Senate Comm. on Labor and Human Resources, 98th Cong., 1st Sess. (1983) 23, 31

Miscellaneous – Continued: Page

Civil Rights: Hearings Before Subcomm. No. 5 of the House Comm. on the Judiciary on Miscellaneous Proposals Regarding the Civil Rights of Persons Within the Jurisdiction of the United States, 88th Cong., 1st Sess. (1963) 16

129 Cong. Rec. 34,499 (1983) 31

Discriminatory Arab Pressure on U.S. Business: Hearings Before the Subcomm. on International Trade and Commerce of the House Comm. on International Relations, 94th Cong., 1st Sess. (1975) 24

Discriminatory Overseas Assignment Policies of Federal Agencies: Hearings Before a Subcomm. of the House Comm. on Government Operations, 94th Cong. 1st & 2d Sess. (1975-1976) 24

Foreign Investment and Arab Boycott Legislation: Hearings Before the Subcomm. on International Finance of the Senate Comm. on Banking, Housing and Urban Affairs, 94th Cong., 1st Sess. (1975) 24

H.R. 4453, 81st Cong., 1st Sess. (1949) 17, 18
H.R. 405, 88th Cong., 1st Sess. (1963) 16, 29
H.R. 7152, 88th Cong., 1st Sess. (1963) 16
H.R. Rep. No. 570, 88th Cong., 1st Sess. (1963) .. 16, 25
H.R. Rep. No. 914, 88th Cong., 1st Sess. (1963) .. 16

Note, *Equal Employment Opportunity for Americans Abroad*, 62 N.Y.U. L. Rev. 1288 (1987) ... 26

Policy Statement No. N-915.033, EEOC Compl. Man. (BNA), at 605:0055 (Sept. 2, 1988) 23, 28, 29

Restatement (Third) of the Foreign Relations Law of the United States (1986) 26, 27

Miscellaneous – Continued: Page

S. 1937, 88th Cong., 1st Sess. (1964) 16

S. Rep. No. 867, 88th Cong., 2d Sess. (1964) 16

Steinhardt, *The Role of International Law As a Canon of Domestic Statutory Construction*, 43 Vand. L. Rev. 1103 (1990) 29

In the Supreme Court of the United States

OCTOBER TERM, 1990

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EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, PETITIONER

v.

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v.

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ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

OPINIONS BELOW

The panel and en banc opinions of the court of appeals (Pet. App. 1a-76a)[1] are reported, respectively, at 857 F.2d 1014 and 892 F.2d 1271. The opinion of the district court (Pet. App. 77a-82a) is reported at 653 F. Supp. 629.

JURISDICTION

The judgment of the court of appeals upon rehearing en banc was entered on February 2, 1990. On April 24, 1990, Justice

[1] "Pet. App." refers to the appendix to the petition in No. 89-1838.

White extended the time for filing a petition for a writ of certiorari to and including May 23, 1990. The petitions for writs of certiorari were filed on May 23, 1990, and were granted on October 1, 1990. This Court has jurisdiction under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, are set forth at Pet. App. 86a-88a.

STATEMENT

1. Ali Boureslan, the plaintiff in this Title VII action, is a naturalized American citizen. The defendants are two Delaware corporations, Arabian American Oil Company (Aramco) and Aramco Services Company (ASC). During the period relevant to this case, Aramco explored for, produced, and refined oil and gas in Saudi Arabia. All of Aramco's shares were owned by Texaco, Exxon, Mobil, and Chevron, or their subsidiaries. Aramco's principal place of business was Dhahran, Saudi Arabia, but it was licensed to do business in Texas. ASC was a wholly owned subsidiary of Aramco; its principal place of business was Houston, Texas. J.A. 21, 24, 41; see Br. in Opp. App. 1a.

In 1979, Boureslan was hired by ASC to work as an engineer in Houston. A year later, Boureslan's request for a transfer to Aramco was granted, and he relocated to Saudi Arabia. In that country, Boureslan alleges, his supervisor systematically mistreated him because of his national origin, religion, and race, and respondents sought to create a record that would justify his termination. On June 16, 1984, Boureslan was discharged. His complaint alleges that the stated grounds for the termination were pretextual and that he was actually discharged because of his national origin, race, and religion. J.A. 7-10, 31-36.

2. After filing a charge of discrimination against Aramco with the EEOC and receiving a right to sue letter, Boureslan commenced this action against Aramco and ASC. His amended

complaint seeks relief under Title VII and also asserts pendent state law claims. J.A. 9-10. Aramco moved to dismiss the complaint for lack of subject matter jurisdiction, arguing that Title VII does not apply to discrimination outside the United States. J.A. 11-12. The district court agreed with that contention and dismissed the Title VII claims against both defendants. Pet. App. 77a-82a. The court also dismissed Boureslan's state law claims for lack of pendent jurisdiction and entered final judgment in favor of both Aramco and ASC. See *id.* at 82a; J.A. 44.

3. A divided panel of the court of appeals affirmed. Pet. App. 28a-82a. The court then granted rehearing en banc; upon rehearing, the court affirmed the district court's judgment by a 9-5 vote. *Id.* at 1a-27a.[2]

a. The en banc majority held that Title VII does not apply to discrimination outside the United States. In reaching that conclusion, it relied on the "canon of construction * * * that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States." Pet. App. 3a (quoting *Foley Bros. Inc.* v. *Filardo*, 336 U.S. 281, 285 (1949)). Title VII, the majority concluded, "does not reflect the necessary clear expression of congressional intent to extend its reach beyond our borders." Pet. App. 7a.

The majority dismissed the contention that the statute's "alien exemption"—which provides that Title VII "shall not apply to an employer with respect to employment of aliens outside any State," 42 U.S.C. 2000e-1—demonstrates that Title VII was designed to apply to discrimination against American citizens outside the United States. Citing *Espinoza* v. *Farah Mfg. Co.*, 414 U.S. 86, 95 (1973), the majority ruled that the alien exemption reflects "a congressional intent to provide Title VII coverage to

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[2] In the court of appeals, the EEOC participated as an amicus curiae before the panel. After entry of the panel's decision, the Commission was granted leave to intervene for the purpose of seeking further review and participated as a party in the rehearing en banc. Pet. App. 85a. See 42 U.S.C. 2000e-5(f)(1) (authorizing court, in its discretion, to permit the Commission to intervene in a civil action upon the Commission's certification that the case is of general public importance).

aliens employed *within* the United States." Pet. App. 4a. Thus, it reasoned, the provision would remain a "meaningful and useful part of the Act" even if Title VII were interpreted not to apply to discriminatory conduct abroad. *Ibid.*

The majority found additional support for its interpretation in what it characterized as the "domestic focus" of the Act and in Title VII's "repeated references" to the "United States", "states" and "state proceedings." Pet. App. 5a. Because Title VII "accommodate[s] state employment discrimination proceedings," the majority continued, "[i]f Congress had intended the Act to apply in foreign countries," it would "have been even more careful to address conflicts with foreign discrimination laws." *Ibid.* The majority also found the Act to be "curiously silent" on issues raised by extraterritorial application of Title VII, saying that Title VII "fails to address venue problems that arise with foreign violations" and that the EEOC's "investigatory powers are limited to evidence obtained in the United States and its territories." *Ibid.*

If the Act were applied extraterritorially, the majority continued, its plain language would reach foreign employers of American citizens. The majority expressed doubt "that Congress ever intended to impose Title VII on a foreign employer who had the grace to employ an American citizen in its own country." Pet. App. 6a. Finally, the court contrasted Title VII with other statutes having undoubted extraterritorial effect—in particular, the Age Discrimination in Employment Act, 29 U.S.C. 630(f). In those other statutes, the majority observed, "Congress demonstrated • • • its awareness of the need to make a clear statement of extraterritorial application, address the concerns of conflicting foreign law, and provide the usual nuts-and-bolts provisions for enforcing those rights." *Ibid.*

b. Five members of the court dissented. The dissenting opinion concluded that "a fair and reasonable reading" of Title VII "compels the conclusion that Congress did, in fact, intend Title VII's broad remedial goals to encompass, and eradicate, an American employer's discriminatory employment practices against a United States citizen, even if the acts constituting such discrimination were carried out on foreign soil." Pet. App. 7a.

The alien exemption, the dissent explained, provides a clear expression of Congress's intent to apply the statute extraterritorially; "[i]f Congress had not envisioned an extraterritorial application of Title VII, a specific provision exempting only aliens from such coverage would not have been needed." *Id.* at 9a. The dissent found further support for its interpretation of Title VII in the alien exemption's legislative history and in the EEOC's interpretation of the statute. *Id.* at 12a-16a & nn.3-7.

SUMMARY OF ARGUMENT

Like Ali Boureslan, many Americans spend a portion of their careers working outside the United States for American employers. Foreign assignments provide employees with valuable experience and are essential for advancement in many firms. The question presented by this case is whether Title VII provides Americans with protection from discrimination on the basis of race, sex, national origin, and religion while they are employed by American employers abroad.

I. There is no doubt that Congress has constitutional authority to prohibit such discrimination. In determining whether Congress has exercised that authority here, it is appropriate to refer to the canon of construction that, unless a contrary intent appears, legislation is interpreted to apply only within the territorial limits of the United States. Title VII satisfies the requirement imposed by this presumption; the language of the statute clearly manifests Congress's intention to prohibit employment discrimination abroad by American employers against American citizens.

A. By its terms, Title VII reaches discrimination against Americans employed abroad. The Act prohibits discriminatory employment practices by "an employer"—a defined term including all firms that employ a specified number of employees and are engaged in an industry affecting commerce. The statutory definition provides no exclusion for employers conducting operations abroad, and the term "commerce" is defined to include foreign commerce. Accordingly, American corpora-

tions that employ American citizens abroad are among the employers subject to the Act.

B. Section 702 of the Act, 42 U.S.C. 2000e-1, provides that Title VII does not apply to "the employment of aliens outside any State." This exemption demonstrates that Congress intended to protect American citizens from employment discrimination abroad. Congress could not rationally have enacted an exemption for aliens (but not citizens) with respect to employment abroad while at the same time believing that Title VII could not apply extraterritorially in the first place. The court of appeals' surmise that Congress enacted the alien exemption in order to confer coverage on aliens employed within the United States is untenable. Indeed, the legislative history of the alien exemption confirms that its purpose was to limit the potential for conflicts with foreign law by withdrawing coverage from aliens abroad.

C. No provision of Title VII is inconsistent with its application to the employment of American citizens by American employers abroad. Contrary to the court of appeals' suggestion, Title VII does not create a venue gap for cases arising from discrimination abroad. And even if such a gap existed, it would reflect at most a decision to limit plaintiffs' choice of forum, not an intention to withdraw all protection from Americans employed abroad. Similarly, the statute's limitation on the scope of the EEOC's subpoena power does not suggest a limit on the statute's substantive provisions. The remainder of the EEOC's authority and the rights conferred on private plaintiffs embody no geographical limitation. As other statutes containing virtually identical subpoena provisions reflect, there is no necessary relationship between an agency's subpoena power and the scope of the statute it administers.

D. The EEOC, the agency charged with principal responsibility for administering Title VII, has interpreted the statute to apply extraterritorially. The Justice Department, which also has responsibilities in this area, has reached the same conclusion. These consistent constructions of the statute by the responsible

agencies confirm that Congress's intent was to apply Title VII to Americans employed by American employers abroad.

II. Concern for potential conflicts between Title VII and the laws of foreign states, on which the court of appeals placed great emphasis, does not justify restricting the statute to discrimination within the United States.

A. Congress has spoken to the possibility that Title VII may conflict with foreign law. The exemption for the employment of aliens outside the United States embodies the balance that Congress struck between the goals of eradicating employment discrimination and avoiding conflicts with foreign laws. The courts are not at liberty to restrike that balance.

B. Applied to discrimination by American corporations against American citizens, Title VII does not raise a serious prospect of irreconcilable conflicts with foreign laws. International law recognizes a state's right generally to prescribe legal rules for its nationals outside the state's boundaries. Title VII provides potential defenses to employers that are compelled by the law of the territorial sovereign to engage in conduct that would otherwise be prohibited by Title VII. Application of Title VII to cases such as this does not infringe upon the sovereignty of foreign states.

C. In providing for limited deference to state fair employment proceedings but not to foreign procedures, Title VII does not suggest that Congress intended to limit Title VII to discrimination within the United States. Congress's decision not to require reference of charges of discrimination to unfamiliar foreign proceedings scarcely suggests that it turned a blind eye to employment discrimination by American employers against American citizens abroad. Indeed, because Title VII supersedes all inconsistent state law, it is even less tolerant of conflicts with state law than it is of conflicts with foreign law. The statutory provisions accommodating state fair employment laws provide no basis for doubt as to Congress's intention to prohibit discrimination abroad.

D. In 1984, Congress amended the Age Discrimination in Employment Act to make clear its intention to prohibit age discrimination against Americans employed abroad. Contrary

to the court of appeals' suggestion, those amendments do not reflect an intention to distinguish between age discrimination and discrimination based on race, sex, national origin, or religion. Indeed, it would be anomalous to construe Title VII to provide Americans abroad with less protection from discrimination based on race, sex, national origin, or religion than from discrimination based on age. In fact, the legislative history of the ADEA amendments reflects that Congress believed that it was bringing the ADEA into line with Title VII and providing Americans working abroad with substantially the same protection from all forms of discrimination. Construing Title VII to be inapplicable abroad would resurrect (in reverse) the anomaly that the 1984 Congress acted to eliminate.

ARGUMENT

I. TITLE VII MANIFESTS A CLEAR CONGRESSIONAL INTENTION TO PROHIBIT DISCRIMINATION OUTSIDE THE UNITED STATES BY AMERICAN EMPLOYERS AGAINST AMERICAN CITIZENS

The issue in this case—whether Title VII protects American citizens against invidious employment discrimination by American corporations outside of the United States[3]—is exclusively one of statutory interpretation. Congress's power to legislate under the Commerce Clause, the primary source of constitutional authority for Title VII, is not confined to the territorial limits of the United States. As long as it acts within its enumerated powers, Congress can "regulate the actions of our citizens outside the territorial jurisdiction of the United States

[3] For purposes of Title VII, "the term 'State' includes a State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, the Canal Zone, and Outer Continental Shelf lands defined in the Outer Continental Shelf Lands Act [43 U.S.C. 1331 *et seq.*]." This brief's references to the "United States" encompass all territory within the confines of these "States."

whether or not the act punished occurred within the territory of a foreign nation." *Vermilya-Brown Co.* v. *Connell*, 335 U.S. 377, 381 (1948).[4]

In determining whether Congress has exercised its authority to regulate extraterritorially, this Court has employed a canon of construction "that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States." *Foley Bros., Inc.* v. *Filardo*, 336 U.S. 281, 285 (1949).[5] That canon "is based on the assumption that Congress is primarily concerned with domestic conditions" (*ibid.*); it also serves to protect against needless conflicts between our laws and those of other states, cf. *McCulloch* v. *Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 21-22 (1963). The ultimate issue, however, remains one of legislative intent.

[4] Accord *Blackmer* v. *United States*, 284 U.S. 421, 437 (1932); *Patterson* v. *Bark Eudora*, 190 U.S. 169, 178-179 (1903); *Skiriotes* v. *Florida*, 313 U.S. 69, 73 (1941); *Foley Bros., Inc.* v. *Filardo*, 336 U.S. 281, 284-285 (1949); *Steele* v. *Bulova Watch Co.*, 344 U.S. 280, 282, 285-286 (1952); *McCulloch* v. *Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 17 (1963).

[5] See also *American Banana Co.* v. *United Fruit Co.*, 213 U.S. 347, 357 (1909); *Sandberg* v. *McDonald*, 248 U.S. 185, 195 (1918); *United States* v. *Bowman*, 260 U.S. 94, 98 (1922); *New York Central R.R.* v. *Chisholm*, 268 U.S. 29, 31-32 (1925); *Blackmer* v. *United States*, 284 U.S. 421, 437 (1932); *United States* v. *Flores*, 289 U.S. 137, 155 (1933); *Steele* v. *Bulova Watch Co.*, 344 U.S. 280, 285 (1952); *Argentine Republic* v. *Amerada Hess Shipping Co.*, 109 S. Ct. 683, 691 (1989). The Court has retreated somewhat from the strict concept of territoriality advanced in *American Banana*. See *Steele* v. *Bulova Watch Co.*, 344 U.S. at 288; *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690, 704 (1962).

In other contexts, the Court has indicated that a different form of analysis may apply. See *United States* v. *Bowman*, 260 U.S. at 98 (presumption against extraterritoriality is not applicable to statutes designed to protect the United States government from fraud, because those statutes "are not logically dependent on their locality for the Government's jurisdiction"). See also *Tamari* v. *Bache & Co. (Lebanon) S.A.L.*, 730 F.2d 1103, 1107 n.11 (7th Cir.), cert. denied, 469 U.S. 871 (1984); *Schoenbaum* v. *Firstbrook*, 405 F.2d 200, 206 (2d Cir.), modified on other grounds, 405 F.2d 215 (1968), cert. denied, 395 U.S. 906 (1969). In this case, the Court need not determine the outer perimeter of the presumption against extraterritoriality or the scope of any exceptions to the presumption that may exist.

To rebut the presumption against extraterritoriality, Congress need not express its intent to regulate outside the United States in any particular way. At the most obvious level, a statute may explicitly be made applicable to foreign parties. See *Patterson* v. *Bark Eudora*, 190 U.S. 169, 173 (1903). So too, broad jurisdictional language suffices to sustain extraterritorial applications of federal statutes that prevent evasion of "the thrust of the laws of the United States in a privileged sanctuary beyond our borders." *Steele* v. *Bulova Watch Co.*, 344 U.S. 280, 287 (1952). Other possibilities exist as well. In determining whether a statute reaches conduct abroad, courts may appropriately consult all materials customarily employed in statutory interpretation. See *Foley Bros.*, 336 U.S. at 285-291 (referring to the language of the statute at issue, its legislative history and "scheme", and administrative interpretations).

Interpreted in accordance with these principles, Title VII applies to discrimination outside the United States by an American employer against an American citizen. On its face, the statute prohibits discrimination by an employer engaged in an industry affecting interstate or foreign commerce, without regard to where the discrimination occurs. Understanding that the statute would apply to discrimination beyond the Nation's borders, Congress added an exemption withdrawing protection from aliens with respect to employment outside the United States. Congress must have understood that—were it not for the express exemption—Title VII *would* apply to aliens employed by American employers outside the United States. The exemption powerfully demonstrates that Congress intended Title VII to apply to the employment of *American citizens* outside this country. Nothing in Title VII supports a different interpretation. Finally, both the EEOC and the Justice Department, the agencies charged by Congress with enforcing Title VII, have consistently construed Title VII to apply to discrimination against American citizens abroad.

A. By Its Terms, Title VII Prohibits Invidious Employment Discrimination Against American Citizens Outside the United States

Title VII prohibits various discriminatory employment practices. 42 U.S.C. 2000e-2, 2000e-3. It is an "unlawful employment practice" for "an employer" (42 U.S.C. 2000e-2(a))

> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

In general, the applicability of this provision to alleged employment discrimination is dependent upon whether the employer satisfies the statutory definition of "an employer," 42 U.S.C. 2000e(b). An employer is subject to Title VII if it has employed 15 or more employees for a specified period and is "engaged in an industry affecting commerce." *Ibid.* An industry affecting commerce is "any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce and includes any activity or industry 'affecting commerce' within the meaning of the Labor-Management Reporting and Disclosure Act of 1959 [29 U.S.C. 401 *et seq.*]." 42 U.S.C. 2000e(h). Commerce, in turn, is defined as "trade, traffic, commerce, transportation, transmission, or communication among the several States; or between a State and any place outside thereof; or within the District of Columbia, or a possession of the United States; or between points in the same State but through a point outside thereof." 42 U.S.C. 2000e(g).[6]

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[6] Respondents have not contended that they lack the requisite number of employees or are not engaged in "an industry affecting commerce".

By their terms, these provisions reach employment discrimination occurring outside the United States. The statute's prohibition on "unlawful employment practices" is not limited to discriminatory practices occurring at any particular place, and the definition of employer includes both interstate and foreign commerce. Nothing in the statute makes the protection available to American citizens who are "individual[s]," "employees," or "applicants for employment" dependent on where they may be located when they are victimized by discrimination. In this respect, Title VII's jurisdictional provisions are similar to the "broad jurisdictional grant in the Lanham Act" upon which this Court relied in holding the trademark statute applicable to conduct outside this country. *Steele* v. *Bulova Watch Co.*, 344 U.S. at 286. See also *Branch* v. *FTC*, 141 F.2d 31, 34-35 (7th Cir. 1944).

B. Title VII's Exemption for Aliens With Respect to Employment Outside the United States Clearly Manifests An Intention to Protect American Citizens With Respect to Employment Outside the United States

1. In determining whether Title VII applies to discrimination by U.S. employers outside the United States, it is unnecessary to rely exclusively on the statute's broad jurisdictional provisions, for the "alien exemption" provision powerfully demonstrates Congress's intent to apply Title VII extraterritorially. That exemption is found in Section 702 of Title VII, 42 U.S.C. 2000e-1, which provides that the statute "shall not apply to an employer with respect to the employment of aliens outside any State." Against the background of Title VII's jurisdictional provisions, the thrust of this exemption is unmistakable. Congress understood that Title VII would apply to discrimination outside the United States, but chose not to confer protection on aliens outside this country. Accordingly, it fashioned an exemption for that group, limiting the statute's extraterritorial application to the employment of American citizens outside any State.

No other plausible explanation of the alien exemption exists. If Congress believed that the statute did not apply extraterritorially, it would have had no reason to include an exemption for a certain category of individuals employed outside the United States. Alternatively, if Congress believed that the statute would (or might) be interpreted to apply overseas but wished to withhold protection from both Americans and aliens employed abroad, the only sensible way to express that intention would have been to include an exemption encompassing the employment of all individuals abroad. The statute's jurisdictional provisions cannot possibly be read to confer coverage only upon aliens employed outside the United States. Thus, Congress could not rationally have enacted an exemption for the employment of aliens abroad if it intended to foreclose *all* potential extraterritorial applications of the statute.

In this respect, this case is similar to *Pennsylvania* v. *Union Gas Co.*, 109 S. Ct. 2273 (1990). In *Union Gas*, the Court noted that a provision exempting States from certain liability for hazardous waste cleanup manifested Congress's intention that States would be liable for cleanup costs beyond the scope of the exemption. The Court explained that the exemption "is, needless to say, an explicit recognition of the potential liability of States under this statute; Congress need not exempt States from liability unless they would otherwise be liable." *Id.* at 2278. The same inference should be drawn from the alien exemption in this case.[7]

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[7] The Eleventh Amendment imposes a more stringent clear statement requirement than the presumption against extraterritoriality; Congress may abrogate the States' Eleventh Amendment immunity "only by making its intention unmistakably clear in the language of the statute." *Atascadero State Hosp.* v. *Scanlon*, 473 U.S. 234, 242 (1985). Compare *Foley Bros.*, 336 U.S. at 285 (presumption against extraterritoriality is "a valid approach whereby unexpressed congressional intent may be ascertained"). Thus, the reasoning of *Union Gas* applies *a fortiori* to this case. See also *Andrus* v. *Glover Constr. Co.*, 446 U.S. 608, 616-617 (1980) ("Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent.").

Title VII also contains an exemption for religious institutions "with respect to the employment of individuals of a particular religion to perform work connected with" the institutions' "religious activities." This exemption – like the alien exemption as we construe it – clearly withdraws coverage that would

2. With the exception of this case, all judicial decisions addressing the territorial scope of Title VII have concluded that the alien exemption reflects an intention to provide American citizens with protection from employment discrimination abroad.[8] The court of appeals, however, ruled that the exemption could plausibly be read as a means of "provid[ing] Title VII coverage to aliens employed *within* the United States," and suggested that the "negative inference" arising from the exemption was too insubstantial to sustain an extraterritorial application of the statute. Pet. App. 4a, 7a. This line of reasoning is strained and untenable. It requires an exemption to be read as a backhanded grant of coverage; what is more, the court's interpretive gymnastics embody a fundamental misconception of the principles of statutory interpretation that govern the extraterritorial application of statutes.

a. Whatever its implications may be, the alien exemption's office is not to confer statutory protection on aliens inside the United States. The plain language of another provision does that. As this Court noted in *Espinoza*, 414 U.S. at 95, aliens in this country are entitled to protection because they are among the "individuals" referred to in Section 703 of Title VII, 42 U.S.C. 2000e-2. If Congress had entertained any doubt as to whether Section 703 was sufficient to protect resident aliens, the only rational way to erase that uncertainty would have been to include a provision specifically conferring coverage on those individuals. The roundabout tactic of carving out an exemption

otherwise exist. Further, courts have rejected claims, comparable to respondents' here, that Title VII should be construed to allow discrimination by religious institutions that is outside the scope of the exemption. See *McClure* v. *Salvation Army*, 460 F.2d 553, 558 (5th Cir.), cert. denied, 409 U.S. 896 (1972); *EEOC* v. *Pacific Press Publishing Ass'n*, 676 F.2d 1272, 1276-1277 (9th Cir. 1982).

[8] *Akgun* v. *Boeing Co.*, No. C89-1319D (W.D. Wash. June 7, 1990); *Seville* v. *Martin Marietta Corp.*, 638 F. Supp. 590 (D. Md. 1986); *Bryant* v. *International Schools Services, Inc.*, 502 F. Supp. 472 (D.N.J. 1980), rev'd on other grounds, 675 F.2d 562 (3d Cir. 1982); *Love* v. *Pullman Co.*, 13 Fair Empl. Prac. Cas. (BNA) 423, 426 n.4 (D. Colo. July 21, 1976), aff'd on other grounds, 569 F.2d 1074 (10th Cir. 1978).

from coverage for a different class would not have had the strangely generative effect of creating coverage that did not otherwise exist.

As this Court noted in *Espinoza* v. *Farah Mfg. Co.*, *supra*, the alien exemption does *confirm* Congress's intention to provide protection to aliens within the United States. If the statute could never apply to discrimination against aliens, it would have been unnecessary to exempt aliens with respect to their employment outside this country. It does not follow, however, that the exemption can plausibly be viewed as "meaningful and useful" (Pet. App. 4a) only to the extent it bears on aliens in this country.

To the contrary, the inferences that the exemption supports with respect to the employment of aliens within the United States and the employment of citizens abroad are inseparable and equally compelling. By withdrawing protection from aliens with respect to their employment outside the United States, the exemption establishes that two groups falling outside the exemption – in *Espinoza*, aliens employed inside the United States and, here, citizens employed abroad – are covered. Those inferences are in no sense alternatives to one another. Both flow equally from the alien exemption.

b. The court of appeals' suggestion that a "negative inference" is insufficient to support a statute's extraterritorial application misconceives the nature of the presumption against extraterritoriality. The presumption is an "approach whereby unexpressed congressional intent may be ascertained," *Foley Bros.*, 336 U.S. at 285, not a requirement of form. Title VII combines a broad grant of protection from discrimination with an exemption for the employment of aliens abroad. That combination is an entirely natural way to express an intention to confer coverage on Americans employed abroad. The presumption against extraterritoriality demands nothing more.

3. The legislative history of the alien exemption confirms that its function was to withdraw coverage from aliens abroad

(not, as the court of appeals suggested, to extend coverage to aliens in this country). In the 88th Congress, the alien exemption was initially included in H.R. 405, 88th Cong., 1st Sess. (1963). The committee report on this bill stated that the purpose of the exemption was "to remove conflicts of law which might otherwise exist between the United States and a foreign nation in the employment of aliens outside the United States by an American enterprise." H.R. Rep. No. 570, 88th Cong., 1st Sess. 4 (1963).[9] This explanation demonstrates that the exemption's function was what its form suggests—to withdraw coverage from aliens with respect to their employment abroad. The potential "conflicts of law" to which the report referred could only arise outside the United States; in stating that the exemption was designed to "remove" those potential conflicts, the report manifested the committee's understanding that Title VII would otherwise apply outside the United States.

The committee report on the Senate's employment discrimination bill, S. 1937, 88th Cong., 1st Sess. (1964), included a very similar explanation of the alien exemption: "Exempted from the bill are • • • U.S. employers employing citizens of foreign countries in foreign lands." S. Rep. No. 867, 88th Cong., 2d Sess. 11 (1964). Like its House counterpart, the Senate report made clear that the exemption's purpose was to limit the extraterritorial application of the statute in "foreign lands," not to extend coverage to aliens in this country. If there were any

[9] After H.R. 405 was reported to the floor of the House, the House Committee on the Judiciary held hearings on a number of civil rights bills, including H.R. 405. The committee report on H.R. 405 was incorporated in the record of those hearings. See *Civil Rights: Hearings Before Subcomm. No. 5 of the House Comm. on the Judiciary on Miscellaneous Proposals Regarding the Civil Rights of Persons Within the Jurisdiction of the United States*, 88th Cong., 1st Sess. 2303 (1963). The upshot of the hearings was an omnibus civil rights bill, H.R. 7152, 88th Cong., 1st Sess. (1963). H.R. 405 was incorporated (with amendments not touching the alien exemption) into H.R. 7152, which in turn was subsequently enacted as the Civil Rights Act of 1964. See H.R. Rep. No. 914, 88th Cong., 1st Sess. 57 (1963) (additional views of Rep. Meader).

doubt as to the untenability of the court of appeals' understanding, the provision's legislative history would lay it to rest.

4. The alien exemption distinguishes Title VII from other statutes that this Court has held do not apply outside the United States. For instance, in *Foley Bros.* v. *Filardo*, *supra*, the Court relied very heavily on the fact that the Eight Hour Law—a statute obligating government contractors to pay overtime to employees who worked more than eight hours in a given day—drew "no distinction • • • between Americans and foreign laborers." 336 U.S. at 286. The Court continued (*ibid.* (emphasis added)):

> Unless we are to read such a distinction into the statute we should be forced to conclude, under respondents' reasoning, that Congress intended to regulate the working hours of a citizen of Iran who chanced to be employed on a public work of the United States in that foreign land. Such a conclusion would be logically inescapable although labor conditions in Iran were known to be wholly dissimilar to those in the United States and wholly beyond the control of this nation. An intention so to regulate labor conditions which are the primary concern of a foreign country should not be attributed to Congress in the absence of a clearly expressed purpose. • • • *The absence of any distinction between citizen and alien labor* indicates to us that the statute was intended to apply only to those places where the labor conditions of both citizen and alien employees are a probable concern of Congress.

By its terms, Title VII draws the very distinction whose absence this Court stressed in *Foley Bros.* In so doing, Title VII manifests Congress's intention to prohibit discrimination by American employers against American citizens abroad.

Indeed, the alien exemption first appeared in proposed fair employment legislation shortly after the decision in *Foley Bros.*, suggesting that it was conceived as a response to that decision. The decision in *Foley Bros.* was issued on March 7, 1949. Six weeks later, on April 29, 1949, Rep. Adam Clayton Powell introduced a fair employment bill, H.R. 4453, 81st Cong., 1st

Sess. (1949), that was apparently the first to include an alien exemption. Evidently, this bill was designed to avoid the problem created by the Eight Hour Law's failure to distinguish between Americans and aliens abroad.

Benz v. *Compania Naviera Hidalgo, S.A.*, 353 U.S. 138 (1957), and *McCulloch* v. *Sociedad Nacional de Marineros de Honduras*, *supra*, involved attempts to apply American labor statutes to *aliens* employed aboard *foreign flag vessels*, which are analogous to foreign territory[10] – a point that was stressed in both cases. In *Benz*, the Court concluded that "Congress did not fashion [the LMRDA] to resolve labor disputes between nationals of other countries operating ships under foreign laws." 353 U.S. at 143. Similarly, in *McCulloch*, the Court framed the "basic" question as "whether [the NLRA] as written was intended to have any application to foreign registered vessels employing alien seamen." 372 U.S. at 19. The alien exemption precludes comparable applications of Title VII.

By virtue of the alien exemption, applying Title VII to employment discrimination abroad against American citizens by American corporations is entirely consistent with the reasoning of *Foley Bros.*, *Benz*, and *McCulloch*.

C. Other Provisions of Title VII Are Consistent With Its Application to Discrimination by American Employers Against American Citizens Abroad

The court of appeals identified two features of Title VII that it believed were inconsistent with extraterritorial application of the statute – the statute's venue provision and its limitation on the reach of the EEOC's subpoena power. Pet. App. 5a-6a. Upon analysis, neither provision weighs against applying Title VII to discrimination abroad against American citizens by American corporations.

1. Section 706(f)(3) of Title VII, 42 U.S.C. 2000e-5(f)(3), allows an action to be brought "in any judicial district in the State in which the unlawful employment practice is alleged to

[10] See, *e.g.*, *Cunard S.S. Co.* v. *Mellon*, 262 U.S. 100, 123-124 (1923); *United States* v. *Rodgers*, 150 U.S. 249, 264 (1893).

have been committed, in the judicial district in which the employment records relevant to such practice are maintained and administered, or in the judicial district in which the aggrieved person would have worked but for the alleged unlawful employment practice" – or, "if the respondent is not found within any such district, • • • within the judicial district in which the respondent has his principal office." Contrary to the court of appeals' suggestion, this provision does not create any significant venue gap for cases arising from discrimination abroad.

Only the first of the alternatives recognized by the statute – venue in a district in a State in which the unlawful employment practice has occurred – is necessarily unavailable in a case arising from discrimination outside the United States. An American corporation that has engaged in discrimination against an American employee may maintain employment records in the United States; the employee may be able to demonstrate that he or she would have been employed in this country but for the alleged discrimination; and, if venue is unavailable under either of those alternatives, the employer is subject to suit in the district in which its "principal office" is located. Identical language in the Jones Act, 46 U.S.C. 688, has been construed to refer to a defendant's principal office *in the United States*.[11] Thus, federal venue will be available in any case in which the defendant has an office in the United States.

[11] *Stewart* v. *Pacific Steam Navigation Co.*, 3 F.2d 329, 330 (S.D.N.Y. 1924) (L. Hand, J.) ("The phrase 'in which its principal office is located' clearly means in which the principal office of the foreign steamship company is located within the United States."). See *Arrocha* v. *Panama Canal Comm'n*, 609 F. Supp. 231, 235 (E.D.N.Y. 1985) (reaching same result under Title VII). This interpretation is consistent with the language of Title VII's venue provision. It gains further support from the principle that because "Congress does not in general intend to create venue gaps," "in construing venue statutes it is reasonable to prefer the construction that avoids leaving such a gap." *Brunette Machine Works Ltd.* v. *Kockum Indus., Inc.*, 406 U.S. 706, 710 n.8 (1972).

In *Yellow Freight System, Inc.* v. *Donnelly*, 110 S. Ct. 1566 (1990), this Court held that state courts have concurrent jurisdiction over Title VII actions. In our view, Title VII should not be construed to limit the venue of state courts hearing Title VII suits. See *Bainbridge* v. *Merchants & Miners Transp. Co.* 287 U.S. 278 (1932).

Even if Title VII were construed to create a venue gap for some cases arising out of discrimination abroad, it would not follow that Title VII should be interpreted to exempt all discrimination outside the United States. At most, the existence of such a gap would suggest that Congress was unwilling to allow Americans employed abroad a wider choice of venue than that available to victims of discrimination in this country. There is no indication that the venue provision was tied to Congress's understanding of the scope of the statute—and no other reason to assume that Congress intended Title VII's venue tail to wag the statutory dog.

2. For similar reasons, Title VII's limitation on the Commission's subpoena power does not justify restricting the Act to discrimination within the United States. At present, the Commission is empowered to issue subpoenas requiring attendance of witnesses and production of evidence "from any place in the United States or any Territory or possession thereof." 42 U.S.C. 2000e-9 (incorporating 29 U.S.C. 161(1)).[12] This limitation—which operates solely on Commission subpoenas, not (as the majority below suggested) on the EEOC's "investigatory powers"—falls far short of suggesting that the Commission lacks any authority to remedy discrimination against Americans abroad, let alone that the statute fails to reach such discrimination.

In all respects save its subpoena authority, the Commission's investigatory powers are subject to no geographical restriction.

[12] This provision was enacted in 1972. Before that time, the Commission secured evidence by means of demands that were enforceable by court order, but "the attendance of a witness [could] not be required outside the State where he is found, resides, or transacts business and the production of evidence [could] not be required outside the State where such evidence is kept." Civil Rights Act of 1964, Pub. L. No. 88-352, Tit. VII, § 710(a), 78 Stat. 264. In our view, the difference between this provision and the provision substituted in 1972 is not material to the question presented in this case. In one respect, however, the 1972 amendment has apparently enhanced the Commission's ability to investigate discrimination abroad. Comparable statutes have been held to permit service of a subpoena in this country for documents located elsewhere. See, *e.g.*, *CFTC* v. *Nahas*, 738 F.2d 487, 492 & n.11, 495-496 (D.C. Cir. 1984).

Section 706(a) of the Act, 42 U.S.C. 2000e-5(a), empowers the Commission to conduct an investigation "[w]henever a charge is filed" alleging an unlawful employment practice. For purposes of those investigations, the Commission enjoys "access to, for the purposes of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to unlawful employment practices covered by [Title VII] and is relevant to the charge under investigation." 42 U.S.C. 2000e-8. Although the Commission's right of access may not be fully enforceable by subpoena, there is no suggestion that its investigatory authority is limited to discrimination occurring in the United States.

Nor is there any territorial limitation on the Commission's other functions under the Act. Nothing in the provisions conferring authority on the Commission to conciliate charges of discrimination, to initiate lawsuits, and to seek interim relief restricts the Commission to discrimination in the United States, 42 U.S.C. 2000e-5(b) and (f). The limit on the EEOC's administrative subpoena authority does not foreclose the Commission's performance of those functions—or impose any restraint on the pursuit of private actions under Title VII. Upon the filing of a lawsuit, the Commission or a private plaintiff may obtain evidence required for a judicial action by means of judicial subpoenas served in this country (Fed. R. Civ. P. 45), subpoenas to American citizens abroad (28 U.S.C. 1783), discovery under the Federal Rules of Civil Procedure, and procedures available under international agreements. See *Societe Nationale Industrielle Aerospatiale* v. *United States District Court*, 482 U.S. 522 (1987) (discussing the principles regulating the choice among these alternatives).

Finally, there is no necessary relationship between an agency's subpoena power and the scope of the statute it is empowered to enforce.[13] The statute authorizing the EEOC to issue sub-

[13] See *FTC* v. *Compagnie de Saint-Gobain-Pont-a-Mousson*, 636 F.2d 1300, 1322 (D.C. Cir. 1980) (noting the distinction between the FTC's authority to serve subpoenas outside the United States and "the larger question of the FTC's authority to investigate both domestic and foreign corporations whose actions have harmful effects on U.S. commerce").

poenas compelling the attendance of witnesses "from any place in the United States or any Territory or possession thereof" (42 U.S.C. 2000e-9 (incorporating 29 U.S.C. 161(1)) is virtually identical to provisions conferring subpoena authority on many other federal agencies, some of which administer statutes reaching conduct outside the United States.[14] A limitation on Title VII's substantive provisions may not properly be inferred from the scope of the Commission's subpoena authority.

D. The EEOC, the Agency Charged With Administrative Enforcement of Title VII, Has Interpreted the Statute to Apply to Discrimination Against Americans Abroad

The EEOC has consistently construed Title VII to apply to discrimination against American citizens outside the United States. In 1975, the EEOC's General Counsel, in a letter to Senator Frank Church, stated that "[t]he language of Title VII indicates a Congressional intent to make the Title applicable to American citizens employed by American companies operating overseas." J.A. 48. If the alien exemption "is to have any meaning at all," the letter explained, "it is necessary to construe it as expressing a Congressional intent to extend the coverage of Title VII to include employment conditions of citizens in overseas operations of domestic corporations at the same time it excludes aliens of the domestic corporation from the operation of the statute." J.A. 49. The letter added that this construction was consistent with the purposes of the statute, noting that "[o]verseas employment practices of covered employers can have a very substantial impact on the employment opportunities in domestic corporations." *Ibid.*

In 1984, the Chairman of the EEOC testified before a subcommittee of the Senate that the alien exemption was indicative of an intention to prohibit discrimination against

[14] For instance, the subpoena authority that the Commission enjoys under the ADEA, a statute applying abroad, is limited to compelling the attendance of witnesses and the production of evidence "from any place in the United States." 15 U.S.C. 49 (incorporated in 29 U.S.C. 209, 626(a)). The SEC's authority under the Securities Exchange Act of 1934 embodies the same limitation. 15 U.S.C. 78s(b).

Americans abroad.[15] The Commission adhered to that interpretation of the statute in a decision issued in 1985. EEOC Dec. No. 85-16, Empl. Prac. Dec. (CCH) ¶ 6856 (Sept. 16, 1985). Citing the alien exemption and district court decisions sustaining Title VII's extraterritorial application, the Commission concluded that "the Act does apply to covered employers with respect to their employment of U.S. citizens outside the United States." *Id.* at 7072.[16] The EEOC is one of two federal agencies with primary responsibility for enforcing Title VII. Its interpretation, which is consistent with the language and legislative history of the relevant provisions, reinforces the conclusion that Congress intended the statute to apply to Americans employed by American employers abroad. See, *e.g.*, *EEOC* v. *Commercial Office Products Co.*, 486 U.S. 107, 115 (1988).

The Justice Department—the other federal agency with Title VII responsibility—has also interpreted the statute to reach discrimination abroad against American citizens. In 1975, an Assistant Attorney General testified before committees of both Houses of Congress that the alien exemptions in Sections 702 and 717 of Title VII imply that the statute applies outside the United States. He stated:

> It should be noted that both Executive Order 11478 and § 717 of Title VII specify that they are not applicable to "aliens employed outside the limits of the United States." The implication of this is that they do apply to United States citizens employed throughout the world.

[15] *Age Discrimination and Overseas Americans, 1983: Hearing Before the Subcomm. on Aging of the Senate Comm. on Labor and Human Resources*, 98th Cong., 1st Sess. 2-4 (1983) (testimony of Clarence Thomas).

[16] Recently, the Commission has issued a statement clarifying its policy with respect to the handling of charges of discrimination against corporations operating abroad. Policy Statement No. N-915.033, EEOC Compl. Man. (BNA), at 605:0055 (Sept. 2, 1988). The Commission has also applied Title VII to claims of federal employees employed by the federal government abroad. See *Cole* v. *Secretary of the Army*, EEOC Dec. No. 05890142 (Aug. 23, 1989); *Hedges* v. *Secretary of Defense*, EEOC Dec. No. 05900454 (June 1, 1990). Section 717 of Title VII, 42 U.S.C. 2000e-16, prohibits invidious discrimination in "[a]ll personnel actions affecting employees or applicants for employment (except with regard to aliens employed outside the limits of the United States)."

> With respect to discrimination in employment by private companies and individuals, Title VII of the 1964 Civil Rights Act, as amended, prohibits a broad range of "unlawful employment practices" by any private employer "engaged in an industry affecting commerce who has fifteen or more employees." * * * Once again the [statute] contains an exemption "with respect to the employment of aliens outside any State," which implies that it is applicable to the employment of United States citizens by covered employers anywhere in the world.[17]

These administrative interpretations of Title VII provide further support for the statute's application to this case. See *Foley Bros.*, 336 U.S. at 288-290.

II. CONCERN FOR POTENTIAL CONFLICTS WITH THE LAWS OF OTHER NATIONS DOES NOT WARRANT LIMITING TITLE VII TO DISCRIMINATION WITHIN THE UNITED STATES

In determining the scope of federal statutes, this Court has been sensitive to potential conflicts between our laws and those of foreign states.[18] In this case, the court of appeals placed great weight on what it perceived as Title VII's lack of attention to such conflicts. The court drew a contrast between Title VII's references to state fair employment laws and its treatment of foreign law. "If Congress had intended the Act to apply in foreign countries," the court stated, "we would expect Congress

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[17] *Foreign Investment and Arab Boycott Legislation: Hearings Before the Subcomm. on International Finance of the Senate Comm. on Banking, Housing and Urban Affairs*, 94th Cong., 1st Sess. 165 (1975) (testimony of Assistant Att'y Gen. Scalia). Accord *Discriminatory Arab Pressure on U.S. Business: Hearings Before the Subcomm. on International Trade and Commerce of the House Comm. on International Relations*, 94th Cong., 1st Sess. 87-88 (1975); *Discriminatory Overseas Assignment Policies of Federal Agencies: Hearings Before a Subcomm. of the House Comm. on Government Operations*, 94th Cong., 1st & 2d Sess. 87-89 (1975-1976).

[18] *McCulloch* v. *Sociedad Nacional de Marineros de Honduras*, 372 U.S. at 21; *Benz* v. *Compania Naviera Hidalgo, S.A.*, 353 U.S. at 145-146. See also *Steele* v. *Bulova Watch Co.*, 344 U.S. at 289.

> to have been even more careful to address conflicts with foreign discrimination laws. Yet the statute says nothing about potential conflicts with foreign discrimination laws." Pet. App. 5a. In the same vein, the court contrasted Title VII with statutes in which Congress had "demonstrated * * * its awareness of the need to * * * address the concerns of conflicting foreign law" (*id.* at 6a).

This reasoning mischaracterizes Title VII and overstates the statute's potential to generate conflicts with foreign law.

A. The Alien Exemption Represents Congress's Solution to Potential Conflicts of Laws

Contrary to the court of appeals' suggestion, Title VII does speak to potential conflicts between Title VII and foreign law. The stated purpose of the alien exemption is to mitigate potential conflicts with foreign law—in the words of the relevant committee report, "to remove conflicts of law which might otherwise exist between the United States and a foreign nation in the employment of aliens outside the United States by an American enterprise." H.R. Rep. No. 570, *supra*, at 4. The alien exemption thus embodies Congress's accommodation of the goals of eradicating employment discrimination and avoiding conflicts with foreign law. Congress "alone has the facilities necessary to make fairly such an important policy decision." *Benz*, 353 U.S. at 147; see *McCulloch*, 372 U.S. at 22. Congress addressed the problem and struck a balance it considered appropriate; the courts are not at liberty to restrike the balance.

B. Properly Applied, Title VII Does Not Create a Serious Potential for Conflicts with International Norms or the Laws of Foreign States

1. Applied to discrimination by American corporations against American employees, Title VII does not give rise to significant conflicts with international norms or the law of foreign states. Both Boureslan and respondents are American

nationals.[19] As this Court has recognized, "the United States is not debarred by any rule of law from governing the conduct of its own citizens upon the high seas or even in foreign countries when the rights of other nations or their nationals are not infringed." *Skiriotes* v. *Florida*, 313 U.S. 69, 73 (1941).[20] That is so even when the result is dual regulation; international law accepts the possibility that more than one state's law may apply simultaneously to a given course of conduct. Restatement (Third) of the Foreign Relations Law of the United States § 403(3) & comment d (1986).

In cases of dual regulation, application of Title VII is unlikely to generate serious conflicts with the laws of individual foreign states. In view of the emerging international consensus on employment discrimination, cases in which foreign law requires American corporations to discriminate on the basis of race, sex, national origin, or religion are likely to be rare.[21] In this case, for instance, respondents have not suggested that any Saudi law mandated discrimination against Boureslan. The possibility that the United States and another nation may both prohibit a particular form of discrimination—or that the other nation's laws neither compel nor prohibit discrimination that is unlawful under Title VII—does not give rise to a conflict of the type that

[19] See Restatement (Third) of the Foreign Relations Law of the United States § 213 (1986) ("For purposes of international law, a corporation has the nationality of the state under the laws of which the corporation is organized."). Cf. *Sumitomo Shoji America, Inc.* v. *Avagliano*, 457 U.S. 176 (1982) (under treaty between Japan and the United States, U.S.-incorporated subsidiaries of Japanese corporations are deemed corporations of the United States).

[20] Accord *Vermilya-Brown Co.* v. *Connell*, 335 U.S. 377 (1948); *Blackmer* v. *United States*, 284 U.S. 421, 436-437 (1932); Restatement (Third) of the Foreign Relations Law of the United States § 402(2) (1986) (except when it would be unreasonable, "a state has jurisdiction to prescribe law with respect to • • • the activities, interests, status, or relations of its nationals outside as well as within its territory").

[21] See Note, *Equal Employment Opportunity for Americans Abroad*, 62 N.Y.U. L. Rev. 1288, 1297-1299 (1987) (and authorities cited therein).

could justify overriding the legislative judgment reflected in the alien exemption.[22]

Even when foreign law compels discrimination that Title VII would otherwise prohibit, defenses available under Title VII serve to mitigate the resulting conflicts. If foreign law requires positions to be filled with persons of a particular sex, nationality, or religion, then that particular characteristic can be considered a bona fide occupational qualification within the meaning of 42 U.S.C. 2000e-2(e).[23] In certain cases, compliance with foreign law may also furnish a non-discriminatory justification for employment decisions that would otherwise be unlawful.[24] The

[22] By contrast, in *McCulloch*, 372 U.S. at 21, application of the NLRA to the foreign crews of foreign flag vessels would have given rise to a "head-on collision" with Honduran law. Under that law, a Honduran union was the exclusive bargaining agent of the ships' crews, and unions of other nationalities were prohibited from acting in that capacity. Recognition of an American union as the bargaining representative would have squarely violated Honduran law.

[23] That Section provides, in pertinent part:

> Notwithstanding any other provision of this subchapter, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees • • • on the basis of [their] religion, sex or national origin in those instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise • • •.

In *Kern* v. *Dynaelectron Corp.*, 577 F. Supp. 1196 (N.D. Tex. 1983), aff'd, 746 F.2d 810 (5th Cir. 1984), the court held that membership in the Islamic faith was a bona fide occupational qualification for a position that involved flying helicopters to Mecca, since under Saudi Arabian law non-Moslems are barred from Mecca under penalty of death.

[24] In EEOC Dec. No. 85-10, Empl. Prac. Dec. (CCH) ¶ 6851 (July 16, 1985), a contract in which an American employer agreed to provide air traffic control services to a foreign country authorized the host country to review and approve the hiring of the air traffic controllers who were to perform the contract. The country withheld a work permit from a female air traffic controller, explaining that its customs and laws prohibited the employment of women in most jobs. Finding that there was a "current, authoritative, and factual basis" for the employer's belief that the host country would not admit the particular controller, the Commission held that there was "a legitimate, nondiscriminatory reason for not hiring [her]." *Id.* at 7053. See Restatement (Third) of the Foreign Relations Law of the United States § 441 & comment b (1986).

availability of these defenses reduces the likelihood that employers will be placed in a position in which it is impossible to comply with both Title VII and the law of a foreign state. Courts may also take foreign law into account in fashioning equitable relief.[25]

2. As the court of appeals noted, more difficult issues would be presented by Title VII's application to *foreign* employers with respect to the employment of Americans abroad. Pet. App. 5a-6a. The court erred, however, in embracing the all-or-nothing proposition that Title VII must be interpreted to apply either to all Americans employed abroad or to none of them. In *United States* v. *Aluminum Co. of America,* 148 F.2d 416, 443 (2d Cir. 1945), the Second Circuit noted that the exceptionally broad language in the Sherman Act could be interpreted to embody accepted international limits on prescriptive jurisdiction. The court explained that courts are "not to read general words, such as those in [the Sherman Act], without regard to the limitations customarily observed by nations upon the exercise of their powers." *Ibid.* This Court has employed a similar approach in interpreting federal maritime statutes. *Lauritzen* v. *Larsen,* 345 U.S. 571, 577 (1953).[26]

[25] The Commission's policy statement on the extraterritorial enforcement of Title VII requires field offices to contact the Commission's Title VII Division if an issue arises concerning a potential conflict with a foreign state's law; the Division then coordinates with the Department of State. EEOC Policy Statement No. N-915.033, *supra,* at 605:0057.

[26] See *Romero* v. *International Terminal Operating Co.,* 358 U.S. 354, 382 (1959); *United States* v. *Palmer,* 16 U.S. (3 Wheat.) 610, 631 (1818). In *Lauritzen,* this Court held that the Jones Act – which creates a damages remedy in favor of "[a]ny seaman who shall suffer personal injury in the course of his employment" – does not apply to an injury suffered by a foreign seaman injured aboard a foreign flag vessel in a foreign port. The Court explained that "[b]y usage as old as the Nation, [American shipping] statutes have been construed to apply only to areas and transactions in which American law would be considered operative under prevalent doctrines of international law." 345 U.S. at 576-577. That approach, the Court continued, was in "accord with the long-heeded admonition of Mr. Chief Justice Marshall that 'an act of congress ought never to be construed to violate the law of nations if any other possible construction remains.'" *Id.* at 578 (quoting *Murray* v. *The Schooner Charming Betsy,* 6 U.S. (2 Cranch) 64, 118 (1804)). See also *Weinberger* v. *Rossi,* 456 U.S. 25, 32 (1982) (noting this principle's force as applied "to the construction of statutes couched in general language which are sought to be applied in an extraterritorial way"); *McCulloch* v. *Sociedad Nacional de Marineros de Honduras,* 372 U.S. at 21-22; Steinhardt, *The Role of International Law As a Canon of Domestic Statutory Construction,* 43 Vand. L. Rev. 1103, 1142-1143 (1990).

International law recognizes a state's jurisdiction to prescribe rules governing its nationals' relations with one another, and the depth of the United States' interest in eliminating discrimination from those relationships cannot be gainsaid. Thus, application of American law to discrimination by an American corporation against an American citizen is entirely consistent with international law. Limiting principles applied in *Alcoa* and *Lauritzen* are available to avoid extreme applications of Title VII that would be violative of international law. Thus, Title VII does not present the stark choice that the court of appeals perceived, and concern about the consequences of applying Title VII to foreign employers cannot justify withholding its protections from Boureslan in this case.[27]

C. Title VII's Treatment of Conflicts with State Law Provides No Basis for Questioning the Extraterritorial Application of the Statute

Citing Title VII's references to state fair employment laws, the court of appeals suggested that Congress could not have in-

[27] In its policy statement on the application of Title VII to discrimination outside the United States, the EEOC has recognized that "[w]here the discrimination takes place overseas, the status of the employer as an American or foreign company is significant." EEOC Policy Statement No. N-915.033, *supra,* at 605:0061.

The legislative history of the alien exemption suggests that Congress's focus was on prohibiting discrimination by "American enterprise[s]." H.R. Rep. No. 570, *supra,* at 4. See S. Rep. No. 867, *supra,* at 11 (referring to "U.S. employers" in "foreign lands"). This case, of course, presents only the question of Title VII's application to alleged discrimination by an American corporation against an American citizen.

tended to apply Title VII to discrimination outside the United States without including equivalent provisions addressing foreign laws. Pet. App. 5a. This reasoning rests on a misapprehension of Title VII. Title VII provides for limited deference to state fair employment *procedures* that are *consistent* with Title VII, but does not subordinate its *substantive* provisions to any *conflicting* requirements of state law. In this light, the fact that the statute also provides no express exception for potentially conflicting foreign laws creates no anomaly that undercuts Title VII's application abroad.

When a State has a law prohibiting the unlawful employment practice alleged in a particular case, the charging party is obligated to file a charge with the State prior to filing a charge with the Commission; the EEOC is obligated to afford the State an opportunity to remedy the practice before seeking its own relief; and, in making its determination as to whether there is reasonable cause to believe that a charge is true, the Commission must "accord substantial weight to final findings and orders made by State or local authorities" in proceedings triggered by those requirements. 42 U.S.C. 2000e-5(b) to 2000e-5(d).[28] The fact that Congress chose not to extend these procedures to foreign governments administering unfamiliar employment laws does not even remotely suggest that it intended to withdraw all protection from Americans employed abroad.

Title VII does not accommodate *conflicting* state fair employment laws. To the contrary, Title VII supersedes any state law that "purports to require or permit the doing of any act which would be an unlawful employment practice under Title VII." 42 U.S.C. 2000e-7. Thus, Title VII is, if anything, less tolerant of conflicts with state law than it is of conflicts with foreign substantive law. Even assuming for the moment that Congress can be expected to view foreign law as equivalent to state law, Title VII does not distinguish between them in a manner casting doubt on its application to Americans abroad.

[28] Section 709(b), 42 U.S.C. 2000e-8(b), also authorizes the Commission to engage in various forms of cooperation with state and local fair employment agencies.

D. The 1984 Amendments to the ADEA Do Not Justify A Distinction Between Age Discrimination and Discrimination Based Upon Race, Sex, National Origin, or Religion

The court of appeals' emphasis on the distinction between Title VII and the 1984 amendments to the Age Discrimination in Employment Act was also misplaced. The ADEA amendments were enacted after several courts of appeals had held that that statute did not apply abroad.[29] The legislation's express purpose was to confer on American citizens employed abroad the *same protection* against age discrimination that, Congress was advised, Americans already enjoyed from other forms of invidious employment discrimination. Senator Grassley, sponsor of the ADEA amendments, explained that the amendments would "clear[ ] up an anomaly" between the ADEA and Title VII as applied to discrimination abroad. 129 Cong. Rec. 34,499 (1983).[30] The ADEA amendments thus provide no support for the view that the 1964 Congress that enacted Title VII was less concerned with eradicating discrimination against Americans abroad based on race, sex, national origin, and religion than the 1984 Congress was with age discrimination.[31]

[29] *Zahourek* v. *Arthur Young & Co.*, 750 F.2d 827 (10th Cir. 1984); *Cleary* v. *United States Lines, Inc.*, 728 F.2d 607 (3d Cir. 1984). After the ADEA was amended, other courts reached the same conclusion regarding the original version of the statute. *Lopez* v. *Pan Am World Services, Inc.*, 813 F.2d 1118 (11th Cir. 1987); *DeYoreo* v. *Bell Helicopter Textron, Inc.*, 785 F.2d 1282 (5th Cir. 1986); *Ralis* v. *RFE/RL, Inc.*, 770 F.2d 1121 (D.C. Cir. 1985); *Pfeiffer* v. *William Wrigley Jr. Co.*, 755 F.2d 554 (7th Cir. 1985); *Thomas* v. *Brown & Root, Inc.*, 745 F.2d 279 (4th Cir. 1984). These decisions often noted that the alien exemption distinguished Title VII from the ADEA. *E.g.*, *Cleary* v. *United States Lines, Inc.*, 728 F.2d at 609.

[30] During hearings on the proposed legislation, the EEOC's Chairman testified that Title VII had been construed to apply to discrimination outside the United States. See *Age Discrimination and Overseas Americans, 1983: Hearing Before the Subcomm. on Aging of the Senate Comm. on Labor and Human Resources*, 98th Cong., 1st Sess. 2-4 (1983) (testimony of Clarence Thomas).

[31] The provisions of Title VII at issue in this case and the ADEA are not the only prohibitions on employment discrimination outside the United States. See Act of Sept. 28, 1971, Pub. L. No. 92-129, Tit. I, § 106, 85 Stat. 355 (pro-

Title VII, no less than the ADEA, manifests a clear intention to provide American citizens with protection from invidious employment discrimination abroad. The language of Title VII demonstrates that Congress foresaw the statute's application to discrimination outside the United States and tailored its coverage by exempting aliens with respect to employment outside the United States. Nothing in the statute is inconsistent with its application to employment discrimination by American corporations against Americans abroad. The courts below erred in failing to enforce Title VII according to its terms.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

JOHN R. DUNNE
Assistant Attorney General

JOHN G. ROBERTS, JR.
Deputy Solicitor General

DONALD R. LIVINGSTON
Acting General Counsel

STEPHEN L. NIGHTINGALE
Assistant to the Solicitor General

GWENDOLYN YOUNG REAMS
Associate General Counsel

VINCENT J. BLACKWOOD
Assistant General Counsel

SAMUEL A. MARCOSSON
Attorney
Equal Employment Opportunity Commission

NOVEMBER 1990

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hibiting discrimination against American citizens and their dependents on American military bases abroad); 50 U.S.C. App. 2407 (authorizing regulations prohibiting discrimination on basis of race, religion, sex or national origin to comply with foreign boycotts).

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QUESTION PRESENTED

Did Congress intend in 1964 to extend the employment discrimination provisions of the Civil Rights Act of 1964 overseas to regulate the practices of U.S. employers of U.S. citizens in workplaces outside the United States?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	vi
OPINIONS BELOW	1
STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	5
ARGUMENT	9
I. CONGRESS DID NOT INTEND TO EXTEND TITLE VII TO WORKPLACES OVERSEAS TO REGULATE THE PRACTICES OF A U.S. EMPLOYER OF A U.S. CITIZEN IN A FOREIGN COUNTRY	9
A. Acts Of Congress Are Presumed To Apply Only Within The Territory Of The United States Unless Congress Clearly And Affirmatively Expresses A Contrary Intent	12
B. The Requisite Clear Expression Of Affirmative Intent Necessary To Overcome The Presumption Against Extraterritoriality Cannot Be Found In Title VII's Definition of "Commerce"	16
1. Title VII's Definition Of "Commerce" By Its Terms Does Not Reach Overseas Workplaces	17
2. Title VII's Definition Of "Commerce" Was Derived From Statutes That This Court Had Previously Held Do Not Apply Extraterritorially	22

TABLE OF CONTENTS—Continued

Page

C. The Requisite Clear Expression Of Affirmative Intent Necessary To Overcome The Presumption Against Extraterritoriality Cannot Be Found In The Negative Inference From The Alien Exemption Provision 26

1. The History Of The Alien Exemption Provision Demonstrates That Its Dual Purposes Were To Exempt Employers Of Aliens From Coverage In U.S. "Possessions" And To Confirm The Coverage Of Aliens In The United States 26

2. A Negative Inference Cannot Provide The Requisite Clear, Specific Congressional Expression Of Intent Necessary For The Extraterritorial Application Of A U.S. Law 32

D. Extraterritorial Application Of Title VII Would Be Inconsistent With Its Structure And Would Necessarily Result In Coverage Of Foreign As Well As U.S. Employers In Foreign Workplaces 34

E. Congress Could Not Have Intended In 1964 To Impose Our Method Of Dealing With Employment Discrimination On The Many Nations That Have Entered Into Treaties And Conventions Or Adopted Their Own Laws To Deal With Such Matters 40

II. THE EEOC'S CURRENT INTERPRETATION OF TITLE VII IS ENTITLED TO NO DEFERENCE BECAUSE IT IS NEITHER SUPPORTED BY THE STATUTE, CONTEMPORANEOUS WITH ENACTMENT OF TITLE VII NOR CONSISTENT WITH PRIOR POSITIONS TAKEN BY THE AGENCY 43

TABLE OF CONTENTS—Continued

Page

III. SOUND POLICY REASONS SUPPORT THE JUDGMENT OF THE COURTS BELOW THAT TITLE VII SHOULD NOT BE APPLIED TO OVERSEAS WORKPLACES UNLESS CONGRESS CLEARLY INDICATES THAT IT SHOULD 47

CONCLUSION 50

APPENDIX A: Relevant Statutory Provisions 1a

APPENDIX B: Diplomatic Note No. 429 from Her Britannic Majesty's Embassy to the U.S. Department of State 6a

APPENDIX C: Diplomatic Note No. 177 from the Embassy of Canada to the U.S. Department of State 8a

APPENDIX D: Diplomatic Note No. 370 from the Embassy of Australia to the U.S. Department of State 10a

TABLE OF AUTHORITIES

CASES — Page

Abrams v. *Baylor College of Medicine*, 805 F.2d 528 (5th Cir. 1986) 47
Addison v. *Holly Hill Fruit Prods. Co.*, 322 U.S. 607 (1949) 11
Air Line Dispatchers Ass'n v. *National Mediation Bd.*, 189 F.2d 685 (D.C. Cir.), *cert. denied*, 342 U.S. 849 (1951) 21
Air Line Stewards & Stewardesses Ass'n Int'l v. *Northwest Airlines, Inc.*, 267 F.2d 170 (8th Cir.), *cert. denied*, 361 U.S. 901 (1959) 21
Akgun v. *Boeing Co.*, No. C89-1319D (W.D. Wash. June 7, 1990) 34
Andrus v. *Glover Constr. Co.*, 446 U.S. 608 (1980) 37
Argentine Republic v. *Amerada Hess Shipping Co.*, 109 S. Ct. 683 (1989) 12, 13
Benz v. *Compania Naviera Hidalgo*, 353 U.S. 138 (1957) ..... *passim*
Blackmer v. *United States*, 284 U.S. 421 (1932) 12, 13
Branch v. *FTC*, 141 F.2d 31 (7th Cir. 1944) 22
Bryant v. *Int'l Schools Servs., Inc.*, 502 F. Supp. 472 (D.N.J. 1980), *rev'd on other grounds*, 675 F.2d 562 (3d Cir. 1982) 33, 34, 48
CFTC v. *Nahas*, 738 F.2d 487 (D.C. Cir. 1984) 39, 47
Cleary v. *United States Lines, Inc.*, 728 F.2d 607 (3d Cir. 1984) 34
Continental Ore Co. v. *Union Carbide & Carbon Corp.*, 370 U.S. 690 (1961) 24
Daniel v. *Paul*, 395 U.S. 298 (1969) 22
Dothard v. *Rawlinson*, 433 U.S. 321 (1976) 36
EEOC v. *Kloster Cruise Ltd.*, 53 Fair Emp. Prac. Cas. (BNA) 1229 (S.D. Fla. 1990) 33
Espinoza v. *Farah Mfg. Co.*, 414 U.S. 86 (1973) 8, 30, 46
ETSI Pipeline Project v. *Missouri*, 484 U.S. 495 (1988) 46, 47
Foley Bros., Inc. v. *Filardo*, 336 U.S. 281 (1949) ..... *passim*
General Electric Co. v. *Gilbert*, 429 U.S. 125 (1976) 46
Gibbons v. *Ogden*, 22 U.S. (9 Wheat.) 1 (1824) 17

TABLE OF AUTHORITIES—Continued

Page

GTE Automatic Elec., Inc., 226 N.L.R.B. 1222 (1976) 26
Heart of Atlanta Motel v. *United States*, 379 U.S. 241 (1964) 22
Hodel v. *Virginia Surface Mining Reclamation Ass'n*, 452 U.S. 264 (1981) 17
Katzenbach v. *McClung*, 379 U.S. 294 (1964) 22
Kern v. *Dynalectron Corp.*, 577 F. Supp. 1196 (N.D. Tex. 1983), *aff'd*, 746 F.2d 810 (5th Cir. 1984) 36
Lavrov v. *NCR Corp.*, 600 F. Supp. 923 (S.D. Ohio 1984) 38
Love v. *Pullman Co.*, 13 Fair Emp. Prac. Cas. (BNA) 423 (D. Colo. 1976), *aff'd on other grounds*, 569 F.2d 1074 (10th Cir. 1978) 34, 48
Murray v. *Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804) 43
McCulloch v. *Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10 (1963) ..... *passim*
Mohasco Corp. v. *Silver*, 447 U.S. 807 (1980) 46, 47
New York Central v. *Chisholm*, 268 U.S. 29 (1925) 20
NLRB v. *Catholic Bishop of Chicago*, 440 U.S. 490 (1979) 16
NLRB v. *United Food & Commercial Workers Union*, 484 U.S. 112 (1987) 46
Pennsylvania v. *Union Gas Co.*, 109 S. Ct. 2273 (1990) 34
Pfeiffer v. *Wm. Wrigley, Jr. Co.*, 755 F.2d 554 (7th Cir. 1985) 11, 47
Polish Nat'l Alliance v. *NLRB*, 322 U.S. 643 (1944) 17, 22
Sandberg v. *McDonald*, 248 U.S. 185 (1918) 12, 13, 33
Seville v. *Martin Marietta Corp.*, 638 F. Supp. 590 (D. Md. 1986) 34
Southeastern Community College v. *Davis*, 442 U.S. 397 (1979) 46
Steele v. *Bulova Watch Co.*, 344 U.S. 280 (1952) 22, 23
The Bremen v. *Zapata Off-Shore Co.*, 407 U.S. 1 (1972) 48

TABLE OF AUTHORITIES—Continued

	Page
United States v. *Aluminum Co. of Am.*, 148 F.2d 416 (2d Cir. 1945)	25
United States v. *Bass*, 404 U.S. 336 (1971)	16
United States v. *Bowman*, 260 U.S. 94 (1922)	13
United States v. *Sisal Sales Corp.*, 274 U.S. 274 (1926)	24
Vermilya-Brown Co. v. *Connell*, 335 U.S. 377 (1948)	*passim*
Wickard v. *Filburn*, 317 U.S. 111 (1942)	22
Will v. *Michigan Dep't of State Police*, 109 S. Ct. 2304 (1989)	15, 16
CONSTITUTIONAL PROVISION AND STATUTES	
United States Const., art. I, sec. 8	17
Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634	*passim*
29 U.S.C. § 623(f)	36, 49
29 U.S.C. § 623(h)(1)	49
29 U.S.C. § 623(h)(2)	49
29 U.S.C. § 630(f)	14, 49
Civil Rights Act of 1964, 42 U.S.C. §§ 2000a-2000h-6	*passim*
42 U.S.C. § 2000a(c)	18
42 U.S.C. § 2000e(b)	16, 22, 27
42 U.S.C. § 2000e(g)	16, 18, 27
42 U.S.C. § 2000e(h)	16, 22
42 U.S.C. § 2000e(i)	27
42 U.S.C. § 2000e-2	27, 36
42 U.S.C. § 2000e-5	34, 35, 38
42 U.S.C. § 2000e-7	34, 35
42 U.S.C. § 2000e-9	39
42 U.S.C. § 2000h-4	35
Civil Rights Act of 1964, Pub. L. No. 88-352, § 706(f), 78 Stat. 241 (1964)	19, 39
Comprehensive Anti-Apartheid Act of 1986, 22 U.S.C. §§ 5001-5117	14
22 U.S.C. § 5001	14

TABLE OF AUTHORITIES—Continued

	Page
Consumer Product Safety Act, 15 U.S.C. §§ 2051-2083	23
15 U.S.C. § 2052(a)(12)	23
Export Administration Act of 1979, 50 U.S.C. App. §§ 2401-2420	14, 45
50 U.S.C. App. § 2415(2)	14
50 U.S.C. App. § 2407	45
Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201-219	29
29 U.S.C. § 203(c)	29
Federal Employers Liability Act, 45 U.S.C. §§ 51-60	17, 20
45 U.S.C. § 51	17, 20
Federal Food, Drug and Cosmetic Act, 21 U.S.C. §§ 301-392	23
21 U.S.C. § 321(b)	23
Labor Management Relations Act of 1947, 29 U.S.C. §§ 141-144, 169-187	22
Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. §§ 401-531	16, 22
29 U.S.C. § 402(c)	22
Logan Act, 18 U.S.C. §§ 951-970	14
18 U.S.C. § 953	14
National Labor Relations Act, 29 U.S.C. §§ 151 et seq.	*passim*
29 U.S.C. §§ 151-152	17, 18
29 U.S.C. § 152(6)	23
29 U.S.C. § 157	26
29 U.S.C. § 158(a)(3)	26
Noise Control Act of 1972, 42 U.S.C. §§ 4901-4918	23
42 U.S.C. § 4902(7)	23
Radiation Control for Health and Safety Act of 1968, 42 U.S.C. §§ 263b-263h	23
42 U.S.C. § 263c(4)	23
Railway Labor Act, 45 U.S.C. § 151-181 *et seq.*	18, 21
45 U.S.C. § 151	18, 21

TABLE OF AUTHORITIES—Continued

Page

Transportation Safety Act of 1974, 49 U.S.C. §§ 1801-1812 23
49 U.S.C. § 1802(1) 23

REGULATIONS

29 C.F.R. § 1606.1(c) (1970) 44, 45
45 Fed. Reg. 85,633 (1980) 44

LEGISLATIVE MATERIALS

Age Discrimination and Overseas Americans, 1983: Hearing Before the Subcomm. on Aging of the Senate Comm. on Labor and Human Resources, 98th Cong., 1st Sess. (1983) 45, 49
Discriminatory Arab Pressure on U.S. Business: Hearings Before the Subcomm. on International Trade and Commerce of the House Comm. on International Relations, 94th Cong., 1st Sess. (1975) 44
Foreign Investment and Arab Boycott Legislation: Hearings Before the Subcomm. on International Finance of the Senate Comm. on Banking, Housing and Urban Affairs, 94th Cong., 1st Sess. (1975) 44
Hearings on H.R. 4453 Before the Subcomm. on Education and Labor, 81st Cong., 1st Sess. (1949) 31
H.R. Rep. No. 187, 79th Cong., 1st Sess. (1945) 28
92 Cong. Rec. 184 (1946) 31
92 Cong. Rec. 887 (1946) 31
H.R. 2824, 80th Cong., 1st Sess. (1947) 28
H.R. 4453, 81st Cong., 1st Sess. (1949) 28
95 Cong. Rec. 1682 (1949) 31
96 Cong Rec. 2175 (1950) 31
H.R. Rep. No. 1165, 85th Cong., 1st Sess. (1957) 29
S. Rep. 987, 85th Cong., 1st Sess. (1957) 31
H.R. 10,144, 87th Cong., 2d Sess. (1962) 29
S. 1937, 88th Cong., 1st Sess. (1963) 32
H.R. 405, 88th Cong., 1st Sess. (1963) 18, 19
H.R. 7152, 88th Cong., 1st Sess. (1963) 19
H.R. Rep. 570, 88th Cong., 1st Sess. (1963) 20, 32

TABLE OF AUTHORITIES—Continued

Page

Interpretative Memorandum on Title VII, 110 Cong. Rec. 7212 (1964) 20, 23
110 Cong. Rec. 12,811 (1964) 19
S. Rep. 867, 88th Cong., 2d Sess. (1964) 20, 32
S. Rep. 1580, 88th Cong., 2d Sess. (1964) 33
110 Cong. Rec. 15,897 (1964) 19
S. Exec. Doc. L., 92d Cong., 1st Sess. (1971) 41
129 Cong. Rec. 34,499 (1983) 48
136 Cong. Rec. S1200 (daily ed. Feb. 20, 1990) 41

BOOKS AND TREATISES

J. Atwood & K. Brewster, *American Business Abroad* (2d ed. 1981 & Supp. 1990) 25
M.R. Konvitz, *The Alien and the Asiatic in American Law* (1946) 31
D. Lange & G. Born, *The Extraterritorial Application of National Laws* (1987) 25
L. Tribe, *American Constitutional Law* (2d ed. 1988) 17
C. Whalen & B. Whalen, *The Longest Debate: A Legislative History of the 1964 Civil Rights Act* (1985) 11
Restatement (Third) of Foreign Relations Law of the United States (1986) ..... *passim*
§ 114 reporters' note 1 43
§ 402 24
§ 402(c) 25
§ 402 comment b 4, 13
comment c 24, 25
comment d 25
reporters' note 1 13
§ 414 comment c 14, 25
§ 416 comment a 25
Restatement (Second) of Foreign Relations Law of the United States (1965) 24

ARTICLES

Gerber, *Beyond Balancing: International Law Restraints on the Reach of National Laws*, 10 Yale J. Int'l. L. 185 (1984) 25

TABLE OF AUTHORITIES—Continued

	Page
Kirschner, *Extraterritorial Application of Title VII of the Civil Rights Act*, 34 Lab. L.J. 394 (1983)	31
Rosenthal, *Jurisdictional Conflicts Between Sovereign Nations*, 19 Int'l. Law. 487 (1985)	25
MISCELLANEOUS	
Constitution of the International Labour Organization	41
art. 19, section 7	41
art. 26	41
Decision No. 85-16, Emp. Prac. Guide (CCH) § 6857 (1985)	45
International Labour Organization Convention (No. 111) Concerning Discrimination in Respect of Employment and Occupation, 362 U.N.T.S. 31 (1958)	8, 9, 40
Kingdom of Saudi Arabia, Labor and Workmen Law (1969)	3, 41
New York Times, Mar. 2, 1949, at 20, col. 5	31
Policy Statement No. 88-15, EEOC Compl. Man. (CCH) ¶ 2187 (1989)	37, 38, 45
The Vienna Convention on the Law of Treaties, May 23, 1969, art. 18, U.N. Doc. A/CONF. 39	41
International Labour Organization, *Legislative Services, General Subject Index 1919-1989* (1989)	40
United States Equal Employment Opportunity Commission, *Legislative History of Titles VII and XI of the Civil Rights Act of 1964* (1968)	19

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

Nos. 89-1838 and 89-1845

ALI BOURESLAN and
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Petitioners,

v.

ARABIAN AMERICAN OIL COMPANY and
ARAMCO SERVICES COMPANY,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF FOR RESPONDENTS ARABIAN AMERICAN OIL COMPANY AND ARAMCO SERVICES COMPANY

OPINIONS BELOW

The *en banc* decision of the court of appeals is reported at 892 F.2d 1271 (Pet. App. 1a-27a).[1] The panel decision is reported at 857 F.2d 1014 (Pet. App. 28a-76a). The district court decision that was affirmed by both the panel and the *en banc* court is reported at 653 F. Supp. 629 (Pet. App. 77a-82a).

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[1] "Pet. App." refers to the Appendix to the Petition for Certiorari filed by the Solicitor General on behalf of the EEOC in No. 89-1838. "J.A." refers to the Joint Appendix filed by the parties in this Court.

STATUTORY PROVISIONS INVOLVED

The most relevant provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2000e-17 ("Title VII"), and of the Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. §§ 621-634, are set out in Appendix A, 1a-5a.

STATEMENT OF THE CASE

At all relevant times, the Arabian American Oil Company ("Aramco") was a Delaware corporation whose principal place of business and records were located in Dhahran, Saudi Arabia. Since its inception and until recently, Aramco's business had been the exploration for and the production, refining and sale of oil and gas exclusively in Saudi Arabia. Aramco Services Company ("ASC"), formerly a subsidiary of Aramco, is a Delaware corporation headquartered in Houston, Texas. J.A. 21.[2]

Petitioner Boureslan is a naturalized American citizen of Lebanese origin, who "is by race an Arab, whose religion is Moslem." J.A. 7. Boureslan was employed as a cost engineer by ASC in Houston. At his request he was transferred to Saudi Arabia and became employed by Aramco. J.A. 21, 34. He remained at Aramco for nearly four years until his employment was terminated in Saudi Arabia as part of a general reduction in force. J.A. 24, 33.

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[2] Aramco employed a multinational workforce, including Saudi Arab and U.S. citizens as well as citizens of many other countries. It was owned by Transocean Chevron Company, Exxon Overseas Corporation, Mobil International Petroleum Corporation and Texaco International Trader, Inc. Following the creation in 1988 of the national oil company of Saudi Arabia, the Saudi Arabian Oil Company (Saudi Aramco), substantially all of the assets, business and employees of Aramco were transferred to Saudi Aramco. ASC now is a wholly owned subsidiary of Saudi Aramco. Aramco has filed a Certificate of Dissolution in Delaware, but remains a body corporate under Delaware law for certain purposes, including this litigation.

In charges filed with the Equal Employment Opportunity Commission ("EEOC"), Boureslan alleged that his immediate supervisor (a citizen of the United Kingdom) discriminated against him on the basis of national origin, race and religion during part of the period he was employed by Aramco in Saudi Arabia. J.A. 31-32. He later brought suit against Aramco and ASC in the United States District Court for the Southern District of Texas, alleging violations of Title VII and state law. J.A. 7-10.

Aramco and ASC each moved to dismiss Boureslan's complaint for lack of subject matter jurisdiction, asserting that Title VII did not apply to Boureslan's employment by Aramco in Saudi Arabia. J.A. 11-19. In its motion to dismiss, Aramco noted that the Labor and Workmen Law of the Kingdom of Saudi Arabia "applies to all employment within Saudi Arabia" and that "application of Title VII in this case would unduly infringe on the sovereign right of the Kingdom of Saudi Arabia to regulate employment within its borders." J.A. 12. Aramco's motion was supported by the Declaration of Ismail S. Nazer, an expert on Saudi law, who described the Labor and Workmen Law and its application both to Saudi Arab and foreign nationals working in Saudi Arabia:

> . . . The Kingdom of Saudia Arabia has an extensive code, the Labor and Workmen Law of 1969, which regulates all employment within its borders, including that of citizens of foreign countries. This Code contains numerous substantive provisions and a procedural framework consisting of two judicial commissions by which aggrieved persons may vindicate their rights under the code. These commissions make no distinction between citizens of Saudia Arabia and foreign nationals who work in Saudi Arabia.

J.A. 27-28.

The district court dismissed the complaint, finding that the language and legislative history of Title VII lacked any clearly expressed statement of intent by Congress to

apply Title VII extraterritorially. Pet. App. 79a-81a. The court applied the presumption, articulated by this Court in *Foley Bros., Inc.* v. *Filardo*, 336 U.S. 281 (1949), that statutes are generally presumed not to have extraterritorial application, and concluded:

> It is doubtful that Congress reserved the question of Title VII's application for the courts to decide. It is much more likely that Congress never considered the issue.

Pet. App. 81a.

A divided panel of the United States Court of Appeals for the Fifth Circuit affirmed the district court's decision. The majority held that a statute should not be applied extraterritorially absent a clear expression of intent by Congress. It found no such clear expression of intent in the language of Title VII and concluded that the three general statements from the legislative history cited by the EEOC "[fell] far short of the clear expression of congressional intent required to overcome the presumption against extraterritorial application." Pet. App. 38a. The panel found that Congress simply "did not turn its attention to the possibility" of the extraterritorial application of Title VII, and "[i]t is not for this court to decide this policy issue for the legislative branch." *Id.* at 41a.

The dissent conceded that territoriality "is considered the normal, and nationality an exceptional, basis for the exercise of jurisdiction." Pet. App. 44a n.2 (quoting Restatement (Third) Foreign Relations Law of the United States ("Restatement (Third)") § 402 comment b (1986)). It also acknowledged the presumption that Congress intends legislation to apply only within the territorial jurisdiction of the United States unless a contrary intent appears. Pet. App. 43a-44a. The dissent nevertheless concluded that Title VII applies to U.S. employers employing U.S. citizens overseas. It did not rely, however, on "the broad jurisdictional language" of Title

VII because "requiring a 'clear' expression of congressional intent may mean that the broad jurisdictional language of a statute is not sufficient in itself to support the exercise of extraterritorial jurisdiction." *Id.* at 45a.

On rehearing *en banc*, the court reaffirmed the district court's dismissal of Boureslan's complaint by a vote of 9-5. Pet. App. 1a-2a, 7a. It concluded that neither the provisions of Title VII nor the legislative history demonstrate a "clear congressional intent" to apply the Act to employers outside the borders of the United States. Pet. App. 2a-3a. The court rejected the argument that a negative inference from the alien exemption provision was a clear expression of congressional intent to apply Title VII extraterritorially. *Id.* at 4a. It found that both the statutory provisions and the legislative history of Title VII demonstrate a strong "domestic focus," noting that they make repeated references to "United States," "states," and "state proceedings," with no parallel references to foreign countries or procedures. *Id.* at 5a, 39a-40a.

SUMMARY OF ARGUMENT

The question in this case is whether Congress intended in 1964 to extend the employment discrimination provisions of the Civil Rights Act to regulate the practices of U.S. employers of U.S. citizens in workplaces outside the United States. It is not whether it would have been good policy then, or would be now, to apply Title VII of the Act overseas, but rather whether the statutory language reflects clearly a congressional intent to so apply Title VII.

I. The passage of the Civil Rights Act of 1964 was the culmination of a 20-year struggle to enact a bill to eradicate discrimination within our own borders. In the extensive legislative history of the Civil Rights Act of 1964, there was evident concern and discussion about discrimination in employment, education, voting and public accommodations within the United States, but no expression of concern or any evidence that Congress actually

thought about and chose to address employment discrimination involving U.S. citizens in foreign workplaces. To argue that Congress actually intended that Title VII apply beyond our borders, and that either the definition of "commerce" in the Act or a negative inference drawn from the so-called "alien exemption provision," separately or in combination, constitute a clear expression by Congress of such an intent, is wishful thinking.

A. Decisions of this Court have firmly established the strong presumption that legislation of Congress is meant to apply only within the territorial jurisdiction of the United States absent a clear indication from Congress that it intends to apply the legislation beyond our borders. That presumption is based on the fundamental concept of respect for sovereign nations and their right to regulate conduct within their own borders, as well as on the assumption that Congress is concerned primarily with domestic conditions.

Nowhere does the presumption against the extraterritorial application of U.S. law apply with greater force than in the areas of employment and labor law, traditionally matters of local concern and prerogative. In such cases, this Court has always found that Congress must clearly and affirmatively express its purpose to abandon strict notions of territoriality. It did not do so in Title VII.

B. The requisite clear expression of affirmative intent necessary to overcome the presumption against extraterritoriality cannot be found in Title VII's definition of "commerce." Unlike a variety of other statutes, Title VII's definitions of "commerce" and "industry affecting commerce" make no mention of "commerce with foreign nations," "foreign countries" or "foreign commerce." Indeed, language present in the bill first considered by the House of Representatives (H.R. 405) contained the terms "foreign commerce" and "foreign nations," but those terms were deleted by the Senate before the Civil Rights Act of 1964 was passed. Passage of the Senate version

is inconsistent with the notion of a clearly expressed congressional intent to apply Title VII extraterritorially.

Even statutes that do contain broad language expressly referring to "foreign countries," "foreign nations" or "foreign commerce" have been held by this Court not to reflect a congressional intent that they apply extraterritorially. Furthermore, Title VII defines "an industry affecting commerce" and "affecting commerce" by reference to both the Labor-Management Reporting and Disclosure Act of 1959 and the National Labor Relations Act. Before Congress chose to model Title VII on these provisions, this Court had expressly held that neither statute has extraterritorial application.

C. The EEOC argues that the alien exemption provision of Title VII manifests an intention by Congress to protect U.S. citizens with respect to their employment outside the United States. The alien exemption provision, however, says nothing about the application of Title VII to U.S. employers, U.S. employees or U.S. nationals in workplaces in foreign nations. The negative inference the EEOC asks the Court to draw from the provision does not constitute the clear and affirmative expression required to find that Congress intended Title VII to apply extraterritorially.

The history of the alien exemption provision demonstrates that its dual purposes were to exempt employers of aliens from coverage in U.S. "possessions" and to confirm the coverage of aliens in the United States. The alien exemption provision derives from the proposed 1949 Fair Employment Practices ("FEP") Act, and reflects the efforts by Congress to address the effects of this Court's 5-4 decision in *Vermilya-Brown Co.* v. *Connell*, 335 U.S. 377 (1948). There the Court held that the term "possession" in the Fair Labor Standards Act ("FLSA") included leased bases in foreign nations that were within the control of the United States. The FEP bills redefined "possessions" and included the first alien exemption provision

in order to circumvent the implications of *Vermilya-Brown*. Read together, the definitions of "possession" and the alien exemption provisions were intended to exempt employers of aliens on military bases and leased areas that were subject to U.S. jurisdiction.

In view of the history of the alien exemption provision and the restrictions on employment opportunities for aliens within the United States after World War II, the alien exemption provision also was a meaningful and useful way to confirm the intent of Congress to provide protection to aliens within the United States. *See Espinoza* v. *Farah Mfg. Co.*, 414 U.S. 86, 95 (1973).

D. Title VII as a whole has a domestic focus, with numerous references to states and state proceedings but no references to foreign countries or foreign proceedings. Congress carefully provided requirements that the EEOC accord substantial weight to findings of state or local authorities in proceedings under state or local law, gave a large degree of deference to state and local procedures, and took pains not to override the laws of the various states that were consistent with Title VII. If Title VII were intended to apply to employers in foreign workplaces, Congress also would have included parallel provisions addressing the sensitive areas of conflicts with and deference to foreign laws and procedures. The absence of any such provisions indicates that Congress never considered the matter.

E. While the international community may share the *goal* of eliminating discrimination in employment and many countries are parties to conventions dealing with employment discrimination, that does not support unilaterally imposing Title VII on foreign workplaces. Congress could not have intended to impose U.S. substantive and procedural law on the many nations that have adopted laws of their own or that have ratified treaties and conventions dealing with employment discrimination, such as ILO Convention No. 111, cited by one of the amici.

Saudi Arab law regulates all employment within its borders, and provides a procedural framework for vindication of rights under the law for citizens and non-citizens of Saudi Arabia alike. Under established principles of international law, the United States should not seek to impose its law on Saudi Arabia and on the 110 other countries that have ratified ILO Convention No. 111. The Diplomatic Notes sent to the U.S. Department of State by the Governments of Canada, Australia and the United Kingdom with respect to this case further support this view.

II. No deference should be given to the EEOC's interpretation of Title VII because it is not supported by the statute or the legislative history, was not announced contemporaneously with the enactment of Title VII, and has been far from consistent in the 26 years since enactment of Title VII. It was not until 1988, 24 years after the passage of Title VII, that the EEOC articulated any policy guidance on what it now asserts is the clear intent of Congress to reach U.S. employers of U.S. citizens abroad.

III. Only Congress should decide whether it is good policy to apply Title VII to workplaces overseas, and it has not yet done so. The courts below therefore properly declined to make the policy choices that are assigned to Congress, and this Court should do the same.

ARGUMENT

I. CONGRESS DID NOT INTEND TO EXTEND TITLE VII TO WORKPLACES OVERSEAS TO REGULATE THE PRACTICES OF A U.S. EMPLOYER OF A U.S. CITIZEN IN A FOREIGN COUNTRY.

There is much common ground between the positions of the EEOC and Respondents in this case. We agree that the issue before the Court is "exclusively one of statutory interpretation" and not one of policy (EEOC Br. 8); policy matters are for the Congress and not for the

courts.[3] We also agree that Congress has the power to legislate extraterritorially and does on occasion regulate the actions of U.S. citizens outside U.S. territory. *Id.* at 8-9. The EEOC and Respondents agree, too, that Congress presumptively intends its acts to apply only within U.S. territory, absent a clear statement of intent to the contrary, and that this presumption applies in this case. EEOC Br. 9. We further agree that the established presumption against extraterritoriality is based on the recognition that Congress is concerned primarily with domestic conditions and does not create needless and unintended conflicts between our laws and policies and those of other nations. *Id.*

With this common ground established, the question "remains one of legislative intent" (EEOC Br. 9): Did Congress in 1964 intend to apply the employment discrimination provisions of the Civil Rights Act to regulate the practices of U.S. employers of U.S. citizens in workplaces overseas? Was any such intention expressed clearly and affirmatively to overcome the presumption against extraterritorial application of U.S. laws recognized and applied repeatedly by this Court?

The most candid answer is that Congress simply gave no thought to the extraterritorial application of Title VII, and therefore did not manifest in Title VII a clear and

[3] "EEOC Br." refers to the brief on the merits filed by the Solicitor General on behalf of the EEOC. "EEOC Pet." refers to the EEOC's Petition for Certiorari, and "EEOC Reply Br." refers to the EEOC's brief filed in reply to Aramco's Opposition to the Petition for Certiorari. "Boureslan Br." refers to the brief on the merits filed by Petitioner Ali Boureslan, and "Boureslan Pet." refers to his Petition for Certiorari.

"Lawyers Comm. Br." refers to the brief filed by The Lawyers Committee for Civil Rights Under Law as Amicus Curiae. "Int'l Human Rights Br." refers to the brief filed by The International Human Rights Law Group as Amicus Curiae. "ACLU Br." refers to the brief filed by the American Civil Liberties Union and other amici. "LDF Br." refers to the brief filed by the NAACP Legal Defense and Educational Fund, Inc. and other amici.

affirmative intent to apply it overseas. The passage of the Civil Rights Act of 1964 was the culmination of a 20-year struggle to forge a coalition of Senators and Congressmen sufficiently broad to enact a bill to eradicate discrimination within our own borders. Congress finally was able to accomplish that goal in 1964. *See generally* C. Whalen & B. Whalen, *The Longest Debate: A Legislative History of the 1964 Civil Rights Act* (1985).

In the extensive legislative history of Title VII, there is no evidence that Congress thought about and chose to address employment discrimination in foreign workplaces. To argue that Congress actually intended that Title VII apply beyond our borders, and that the definition of "commerce" in the Act or a negative inference drawn from the "alien exemption provision," either separately or in combination, constitutes a clear expression by Congress of such an intent, is little more than a "retrospective expansion of meaning." *Addision* v. *Holly Hill Fruit Prods. Co.*, 322 U.S. 607, 618 (1949).

As Judge Posner has written in a related context: "[L]ively debate would probably have ensued in Congress if anyone had thought that the new law might be applied to employees living and working in foreign countries. There was no such debate . . . ." *Pfeiffer* v. *Wm. Wrigley, Jr. Co.*, 755 F.2d 554, 559 (7th Cir. 1985) (rejecting arguments for the extraterritorial application of the ADEA, passed three years after Title VII). Since Congress "encounters difficulty enough in resolving points actually in dispute," given its silence on this issue in the debates on Title VII there is "no basis for thinking" that Congress in 1964 intended to apply Title VII to employers of U.S. citizens living and working in foreign workplaces. *See Pfeiffer* v. *Wm. Wrigley, Jr. Co.*, 755 F.2d at 559.

A. Acts Of Congress Are Presumed To Apply Only Within The Territory Of The United States Unless Congress Clearly And Affirmatively Expresses A Contrary Intent.

Firmly established in decisions of this Court and acknowledged by the EEOC and Respondents alike is the strong presumption that applies here, that legislation of Congress is meant to apply only within the territorial jurisdiction of the United States unless Congress makes clear that it applies beyond our borders. *See, e.g., Argentine Republic* v. *Amerada Hess Shipping Co.*, 109 S.Ct. 683, 691 (1989); *Foley Bros., Inc.* v. *Filardo*, 336 U.S. 281, 285 (1949); *Blackmer* v. *United States*, 284 U.S. 421, 437 (1932). The presumption is based on the fundamental concept of sovereignty, that nations have the right to regulate conduct within their own borders and not within the borders of another sovereign. *Sandberg* v. *McDonald*, 248 U.S. 185, 195 (1918) ("Legislation is presumptively territorial and confined to limits over which the law-making power has jurisdiction"). It also is "based on the assumption that Congress is primarily concerned with domestic conditions." *Foley Bros., Inc.* v. *Filardo*, 336 U.S. at 285.

In applying the presumption against extraterritorial application of U.S. laws, this Court has required more than an implication drawn from a negative inference or from the supposed breadth of a statute's jurisdictional provisions. It has required a clear statement affirmatively expressed by Congress that the coverage of a statute is intended to extend outside the territorial boundaries of the United States. *Argentine Republic* v. *Amerada Hess Shipping Co.*, 109 S. Ct. at 691; *McCulloch* v. *Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 18-20 (1963); *Foley Bros., Inc.* v. *Filardo*, 336 U.S. at 285-86, 291; *Sandberg* v. *McDonald*, 248 U.S. at 195.

If Congress intends a statute to apply beyond the borders of the United States, "[i]t is natural for Congress to say so in the statute, and failure to do so will

negative the purpose of Congress in this regard." *United States* v. *Bowman*, 260 U.S. 94, 98 (1922). Provision for extraterritorial application must be "specifically made in the statute," for if Congress intends such extraterritorial application "a few words would . . . stat[e] that intention, not leaving such an important regulation to be gathered from implication." *Sandberg v. McDonald*, 248 U.S. at 195. As the Court said in its most recent application of this requirement: "When it desires to do so, Congress knows how to place the high seas within the jurisdictional reach of a statute." *Argentine Republic* v. *Amerada Hess Shipping Co.*, 109 S. Ct. at 691.

In a challenge to these principles, the EEOC and several amici argue that Title VII applies extraterritorially here because this is a case where both the employer and the employee are U.S. nationals. EEOC Br. 7, 29; Lawyers Comm. Br. 25-26; Int'l Human Rights Br. 31-34; ACLU Br. 25-26. As even the dissent below recognized, however, "[t]erritoriality is considered the normal, and nationality an exceptional basis for the exercise of jurisdiction." Pet. App. 44a n.2 (quoting Restatement (Third) § 402 comment b). Apart from the tax laws and certain laws relating to national security and matters of war and peace —the treason statute, the selective service law, the Logan Act and the Trading With the Enemy Act—the United States rarely has applied its laws to individuals residing abroad on the basis of their United States nationality. Restatement (Third) § 402 reporters' note 1.[4] *See also infra* p. 24 n.18.

Furthermore, the presumption against extraterritorial application and the requirement of a clear and affirmative expression of congressional intent to extend U.S. laws outside the territorial boundaries of the United States are as stringent where nationality is the basis for jurisdiction as in other contexts. Thus, when Congress chooses to legislate extraterritorially based on nationality it regularly

[4] The 1984 amendments to the ADEA were an exception to this general principle, as was the foreign subpoena law at issue in *Blackmer* v. *United States*, 284 U.S. 421 (1932), but Congress in both cases spoke clearly, expressly and affirmatively as to its intent.

uses quite explicit statutory language.[5] Neither the definitional provisions nor the alien exemption provision of Title VII makes reference to U.S. nationals or U.S. citizens. Nor does either apply by its terms only to nationals or citizens. Therefore neither can satisfy the requirement for a clear and affirmative expression of congressional intent to apply Title VII extraterritorially on the nationality principle.

Nowhere does the presumption against extraterritorial application of U.S. law apply with greater force than in the areas of employment and labor law, traditionally matters of local concern and prerogative. Restatement (Third) § 414 comment e. As the EEOC has conceded (EEOC Pet. 11), when faced with the question whether Congress intended to apply extraterritorially other statutes regulating the relationship between employer and employee, this Court has uniformly found that Congress must express its purpose to abandon strict notions of territoriality clearly and affirmatively. *McCulloch* v. *Sociedad Nacional de Marineros de Honduras*, 372 U.S. at 22; *Benz* v. *Compania Naviera Hidalgo*, 353 U.S. 138, 147 (1957); *Foley Bros., Inc.* v. *Filardo*, 336 U.S. at 285.

The Court said in *Foley*:

> The canon of [statutory] construction which teaches that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States . . . is a valid approach whereby unexpressed congressional intent may be ascertained. It is based on the assumption that Congress is primarily concerned with domestic conditions. . . . An intention . . . to regulate labor conditions which are the primary concern of a foreign country should not be attributed to Congress in the absence of a clearly expressed purpose.

336 U.S. at 285-86. As the Court later stated in *Benz*:

> [S]uch a "sweeping provision" as to foreign applicability was not specified in the Act. . . . For us to run interference in such a delicate field of international relations there must be present the *affirmative* intention of the Congress clearly expressed.

353 U.S. at 146-47 (emphasis added). This identical language was used in *McCulloch*. 372 U.S. at 22.[6]

The importance of such a clear and affirmative statement of congressional intent has been underscored by this Court in other areas as well. Recently, in considering whether Congress intended to subject a state to liability under 42 U.S.C. § 1983, the Court stated: "In traditionally sensitive areas," such as federal-state relations, "the requirement of clear statement [by Congress] assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision." *Will* v. *Michigan Dept. of State*

[5] *See, e.g.*, the Comprehensive Anti-Apartheid Act of 1986, 22 U.S.C. § 5001 (defining "national of the United States"); the Export Administration Act of 1979, 50 U.S.C. app. § 2415(2) (defining "United States person"); the Logan Act, 18 U.S.C. § 953 ("Any citizen of the United States, wherever he may be . . ."); the ADEA, 29 U.S.C. § 630(f) ("The term 'employee' includes any individual who is a citizen of the United States employed by an employer in a workplace in a foreign country.").

[6] The EEOC argues that *Benz*, *McCulloch* and *Foley* are distinguishable because those cases turned on the issue of the application of U.S. law to aliens in foreign territory. EEOC Br. 17-18. In *Benz*, the ships and crew, while alien, were in the territorial waters of the United States, *Benz* v. *Compania Naviera Hidalgo*, 353 U.S. at 139, and in *McCulloch* the Honduran ships were owned by a company controlled by a U.S. company that time chartered the vessels and dictated their ports of call, vessels and sailings. *McCulloch* v. *Sociedad Nacional de Marineros de Honduras*, 372 U.S. at 13-14. Both *Benz* and *McCulloch* relied on *Foley*, which concerned the application of U.S. law to U.S. citizens in foreign territory that was in no way part of the United States. *Foley Bros., Inc.* v. *Filardo*, 336 U.S. at 285 ("There is nothing brought to our attention indicating that the United States had been granted by the respective sovereignties any authority, legislative or otherwise, over the labor laws or customs of Iran or Iraq.") While *Foley* noted that the absence of a distinction between aliens and citizens "buttresses our conclusion" (*id.* at 286), the Court applied the presumption to reach its holding that the U.S. law at issue did not clearly manifest congressional intent that it apply to U.S. citizens in a foreign workplace.

Police, 109 S. Ct. 2304, 2308-09 (1989) (quoting *United States* v. *Bass*, 404 U.S. 336, 349 (1971)).[7]

B. The Requisite Clear Expression Of Affirmative Intent Necessary To Overcome The Presumption Against Extraterritoriality Cannot Be Found In Title VII's Definition of "Commerce".

Title VII of the Civil Rights Act of 1964 applies to employers, who are defined to include any "person" who employs 15 or more employees for a specified period and is "engaged in an industry affecting commerce." 42 U.S.C. § 2000e(b). "Industry affecting commerce" is defined in relation to the meaning of "affecting commerce" in the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. § 401 *et seq.* 42 U.S.C. § 2000e(h). "Commerce" is defined as 'trade, traffic, commerce, transporation, transmission, or communication among the several States; or between a State and any place outside thereof; or within the District of Columbia, or a possession of the United States; or between points in the same State but through a point outside thereof." 42 U.S.C. § 2000e(g).

Characterizing these provisions as ones that cover "both interstate and foreign commerce" (EEOC Br. 12), the EEOC argues that Title VII therefore reaches "employment discrimination occurring outside the United States." *Id.* Ignoring the presumption that legislation is limited to the territorial jurisdiction of the United States, the EEOC attempts to shift the focus from the persons covered by Title VII ("employer" in an "industry affecting commerce") to conduct ("discriminatory employment practices") and thereby broaden the jurisdictional provisions. EEOC Br. 11-12. But neither this effort, the jurisdictional provisions themselves (which

[7] *See also NLRB* v. *Catholic Bishop of Chicago*, 440 U.S. 490, 506-07 (1979) (absence of affirmative intention in the statutory language to bring teachers in church-operated schools within the jurisdiction of NLRB means that Congress did not contemplate extending that Act to sensitive areas of First Amendment Religion Clauses).

are not as broad as the EEOC suggests) nor the alien exemption provision provides the clear and affirmative expression of congressional intent necessary to overcome the presumption against extraterritorial application of Title VII.

1. *Title VII's Definition Of "Commerce" By Its Terms Does Not Reach Overseas Workplaces.*

The Constitution gives Congress the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const. art. I, sec. 8. While Congress has broad power coextensive with the language of the Commerce Clause, Congress does not exercise the full extent of that power in every statute it writes.[8] If the language used by Congress in the jurisdictional provisions of a statute is limited to less than "all commerce which may lawfully be regulated by Congress," the reach of the statute necessarily is circumscribed. As Professor Tribe has concluded: "A law will not be held to affect all the activities Congress in theory can control unless statutory language or legislative history constitutes a *clear statement* that Congress intended to exercise its commerce power in full." L. Tribe, *American Constitutional Law* 316 (2d ed. 1988) (emphasis in original); *see Polish Nat'l Alliance* v. *NLRB*, 322 U.S. 643, 647 (1944).

Unlike a variety of other statutes,[9] Title VII's definitions of "commerce" and "industry affecting commerce"

[8] While Congress's power under the Commerce Clause is "plenary," *Gibbons* v. *Ogden*, 22 U.S. (9 Wheat.) 1, 193-94 (1824) (Marshall, J.), its power to regulate every species of commercial intercourse has limitations. *Hodel* v. *Virginia Surface Mining Reclamation Ass'n*, 452 U.S. 264, 310-11 (1981) (Rehnquist, J., concurring) ("it would be a mistake to conclude that Congress' power to regulate pursuant to the Commerce Clause is unlimited . . . the connection with interstate commerce is itself a jurisdictional prerequisite for any substantive legislation by Congress under the Commerce Clause"). *See* L. Tribe, *American Constitutional Law* 314 (2d ed. 1988).

[9] *See, e.g.*, Federal Employees Liability Act, 45 U.S.C. § 51 ("any foreign nation", "foreign commerce"); National Labor Relations

make no mention of "commerce with foreign nations". *See* 42 U.S.C. § 2000e(g). Even within the Civil Rights Act of 1964 itself, Title II (governing public accommodations) has "commerce" language that refers expressly to foreign countries.[10] There is no such language in Title VII. Thus, the "commerce" provision of Title II is not parallel to the definition of "commerce" in Title VII. *Cf.* Lawyers Comm. Br. 10. Even if Title II and Title VII were parallel, however, Title II has never been held to reach a parallel suitation to the one in this case, *i.e.*, the regulation of a place of public accommodation owned by a U.S. citizen that is operated exclusively in a foreign country.

H.R. 405, cited by the EEOC as a bill incorporated into Title VII (EEOC Br. 16 n.9), originally set forth, as to the intent of Congress, certain findings and declarations that specifically referred to "foreign commerce" and "foreign nations."[11] Before the Civil Rights Act was

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Act, 29 U.S.C. § 151-52 ("any foreign country"); Railway Labor Act, 45 U.S.C. § 151 ("any foreign nation").

[10] Title II defines "commerce" as that "among the several States, . . . *or between any foreign country* or any territory or possession and any State or the District of Columbia, or between points in the same State but through any other State . . . *or a foreign country*." 42 U.S.C. § 2000a(c) (emphasis added).

[11] Sec. 2 of H.R. 405 (later part of Section 701 of Title VII of H.R. 7152) read in part as follows:

> Sec. 2. (a) The Congress hereby finds that, despite the continuing progress of our Nation, the practice of discriminating in employment against properly qualified persons because of their race, religion, color, national origin, or ancestry . . . adversely affects the domestic and *foreign commerce* of the United States.
>
> * * * *
>
> (c) The Congress further declares that the succeeding provisions of this Act are necessary for the following purposes:
>
> (1) To remove obstructions to the free flow of commerce among the States and *with foreign nations*.
>
> (2) To insure the complete and full enjoyment by all persons of the rights, privileges, and immunities secured and protected by the Constitution of the United States.

H.R. 405, 88th Cong., 1st Sess. 3 (1963) (emphasis added).

passed by the Senate, however, the "foreign commerce" and "foreign nations" language was deleted. The Senate version of H.R. 7152 was then acceded to by the House. 110 Cong. Rec. 15,897 (1964).

On June 5, 1964, in anticipation of debate on the Senate's substitute bill, the Dirksen-Mansfield Amendment (Amendment No. 656), Senator Dirksen inserted into the Congressional Record an annotated copy of the House bill that reflected the deletion by Senator Dirksen and others of the "foreign commerce" and "foreign nations" language. 110 Cong. Rec. 12,811-817 (1964) (Sen. Dirksen). The Civil Rights Act was passed by the Senate on June 17 and by the House on July 2 *without* the "foreign commerce" and "foreign nations" language. Pub. L. No. 88-352, 78 Stat. 241 (1964). *See* EEOC, *Legislative History of Titles VII and XI of Civil Rights Act of 1964* (1968). There is no explanation in the publicly available legislative history for these deletions, which are inconsistent with the notion of a clearly expressed intent to apply Title VII extraterritorially.

The legislative history of Title VII as passed reflects a consideration of Congress's power under the Commerce Clause, but that consideration was exclusively in terms of interstate and not foreign commerce. While there are suggestions that Congress intended to reach the full extent of its power to regulate commerce *among the states*, there is no mention of its power to regulate in connection with foreign commerce:

> "Commerce" is, generally speaking, interstate commerce, but includes commerce within U.S. possessions and the District of Columbia. It is, in short,

> that commerce to which the regulatory power of Congress extends under the Constitution, a familiar concept which has been employed in other statutes.

Interpretative Memorandum on Title VII, 110 Cong. Rec. 7212 (1964).[12] Thus, the passage of the Senate version of Title VII in lieu of the earlier House version is inconsistent with the notion of a clearly expressed congressional intent to apply Title VII extraterritorially.

Even statutes that contain broad language in their definitions of "commerce" that expressly refer to "foreign country," "foreign nation" or "foreign commerce" have been held not to reflect a congressional intent that they apply extraterritorially. For example, the Federal Employers Liability Act ("FELA"), 45 U.S.C. § 51, declares that every common carrier by railroad while engaging in interstate "or foreign commerce" shall be liable in damages to its employees who suffer injuries while employed by such carrier in commerce. It refers by its terms to "any foreign nation or nations." *Id.* This Court in *New York Central* v. *Chisholm*, 268 U.S. 29 (1925), nevertheless held that there was no jurisdiction under FELA for a damages action where a U.S. citizen employed on a U.S. railroad suffered fatal injuries at a

[12] The legislative history emphasizes Title VII's concern with national, and not foreign, application. *See, e.g.*, S. Rep. 867, 88th Cong., 2d Sess. 8 (1964) (concerning "goal of eliminating racial and religious barriers from the American labor market"); H.R. Rep. 570, 88th Cong., 1st Sess. 2 (1963) (job discrimination "permeates the national social fabric—North, South, East, and West"; H.R. 405 "is directed at correcting such abuses wherever found and is not focused upon any single section of the country."). H.R. Rep. No. 570, the report accompanying H.R. 405, cited by the EEOC (EEOC Br. 16), discusses the "international implications" of its provisions only in terms of the U.S. image abroad as a result of its actions at home: "Each [discrimination] incident pointing up our deficiencies in extending to all of our citizens full and equal rights and opportunities casts doubt upon our sincerity and motives in the international sphere." H.R. Rep. 570, 88th Cong., 1st Sess. 3 (1963).

point thirty miles north of the New York-Canadian border. 268 U.S. at 31-32.[13]

The dissent in the present case therefore expressly did not rely on the definitions of "commerce" and "industry affecting commerce" in Title VII as a basis for extraterritorial application of Title VII. Pet. App. 18a. Rather, it characterized them as "traditional Commerce Clause language" that serves merely as "a 'nexus' requirement, providing a basis for Congress's exercise of power under the Commerce Clause." *Id.*[14]

The EEOC, by contrast, now characterizes that jurisdictional language as an affirmative, clear statement of congressional intent to extend Title VII's coverage to "employment discrimination occurring outside the United States." EEOC Br. 12. Only one of the cases cited to support this assertion, however, reached into foreign ter-

[13] Similarly, despite the reference in the Railway Labor Act ("RLA"), 45 U.S.C. § 151 *et seq.*, as amended to cover air carriers, 45 U.S.C. § 181 *et seq.*, to "foreign nations" in the Act's definition of "commerce," the Eighth Circuit held that the RLA did not apply to employees working in American airplanes wholly outside the United States. *Air Line Stewards & Stewardesses Ass'n, Int'l* v. *Northwest Airlines, Inc.*, 267 F.2d 170, 177-78 (8th Cir.), *cert. denied*, 361 U.S. 901 (1959); *accord Air Line Dispatchers Ass'n* v. *National Mediation Bd.*, 189 F.2d 685 (D.C. Cir.), *cert. denied*, 342 U.S. 849 (1951).

[14] Properly analyzed, the statutory phrase "between a State and any place outside thereof" in the definition of "commerce" in Title VII is a formulation used to provide the jurisdictional nexus required to regulate commerce that is not wholly within a single state, presumably as it affects both interstate and foreign commerce. But it does not provide any basis to regulate conduct exclusively *within* a foreign country.

Vermilya-Brown Co. v. *Connell*, 335 U.S. 377 (1948), cited by the EEOC as support for the notion that Congress can regulate acts of U.S. citizens wholly within the territory of foreign nations (EEOC Br. 8-9), is not on point. The decision there turned on the Court's finding that leased bases were within the sole control of the United States because they were included within the definition of "possession" in the Fair Labor Standards Act. 335 U.S. at 390.

ritory at all and then only because of direct economic effects in the United States,[15] and none of the cited cases involved conduct occurring exclusively on foreign soil.[16] Similarly, Title VII's definition of "commerce" does not evidence any congressional intent to regulate activities exclusively in other countries, let alone the clear expression of affirmative intent necessary to reach activities overseas.

2. *Title VII's Definition Of "Commerce" Was Derived From Statutes That This Court Had Previously Held Do Not Apply Extraterritorially.*

Title VII defines "employer" as "a person engaged in an industry affecting commerce," 42 U.S.C. § 2000e(b), and defines "an industry affecting commerce" by reference to the meaning of "affecting commerce" in the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. § 402(c). 42 U.S.C. § 2000e(h). That Act in turn defines "industry affecting commerce" as an industry included under the Labor Management Relations Act. This Court expressly has held that the Labor Management Relations Act does not have extraterritorial application. *Benz* v. *Compania Naviera Hidalgo*, 353 U.S. at 142-43, 146-47.

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[15] That case, *Steele* v. *Bulova Watch Co.*, 344 U.S. 280 (1952), is discussed *infra* 23-25.

[16] *Branch* v. *FTC*, 141 F.2d 31 (7th Cir. 1944), the only other case cited by the EEOC (EEOC Br. 12), involved a correspondence school conducted from Branch's home in Chicago and the distribution of correspondence courses by mail from Chicago to Latin American countries. 141 F.2d at 33. All of the cases cited by the Lawyers Committee (Lawyers Comm. Br. 10) are domestic in their focus: *Daniel* v. *Paul*, 395 U.S. 298 (1969) (an amusement park near Little Rock, Arkansas); *Katzenbach* v. *McClung*, 379 U.S. 294 (1964) (Ollie's Restaurant located in Birmingham, Alabama); *Heart of Atlanta Motel* v. *United States*, 379 U.S. 241 (1964) (a motel in Georgia); *Polish Nat'l Alliance* v. *NLRB*, 322 U.S. 643 (1944) (a fraternal and cultural benefit society in the business of insurance, organized in over 1800 lodges in 27 states with weekly mailings all over the U.S.); *Wickard* v. *Filburn*, 317 U.S. 111 (1942) (a wheat farmer in Ohio).

The legislative history of Title VII also refers to the National Labor Relations Act ("NLRA"), 29 U.S.C. §§ 151-168. Interpretative Memorandum on Title VII, 110 Cong. Rec. 7212 (1964) ("The term 'affecting commerce' is also familiar, since this is the standard of coverage employed in the National Labor Relations Act . . ."). Yet even though the NLRA, unlike Title VII, contained broad language that clearly referred by its terms to foreign commerce, 29 U.S.C. § 152(6), this Court refused to find a congressional intent to apply the NLRA extraterritorially because there was not "any specific language" in the Act reflecting congressional intent to do so. *McCulloch* v. *Sociedad Nacional de Marineros de Honduras*, 372 U.S. at 19.

Despite the holdings of the Court in *Benz* and *McCulloch*, the EEOC relies on an assertedly "similar . . . broad jurisdictional grant in the Lanham Act" that this Court held applied extraterritorially in *Steele* v. *Bulova Watch Co.*, 344 U.S. at 286 (1952). EEOC Br. 12. The Lanham Act, however, also contained a clear statement of congressional intent to regulate the domestic effects within the United States resulting from the use of deceptive or misleading trademarks overseas and by its terms it reached "all commerce which may lawfully be regulated by Congress." In *Steele*, the Court relied both on that clear intent and that broad Commerce Clause language. *See* 344 U.S. at 283-84. The Lanham Act and *Steele* are inapposite in view of Title VII's more limited "commerce" language, its definitional provisions and its reliance on statutes that the Court held not to be subject to extraterritorial application.[17]

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[17] A large number of other statutes employ similar or identical "commerce" and "affecting commerce" language to that used in Title VII. *See, e.g.*, Consumer Product Safety Act, 15 U.S.C. § 2052(a)(12); Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 321(b); Noise Control Act of 1972, 42 U.S.C. § 4902(7); Radiation Control for Health and Safety Act of 1968, 42 U.S.C. § 263c(4); and Transportation Safety Act of 1974, 49 U.S.C. § 1802(1). The use of such language in these statutes does not evidence any affirma-

The EEOC's references to *Steele* also suggest that it may be asking this Court to ignore the territoriality principle and the presumption relied on by both the majority and the dissent in the court below in favor of a novel application of the so-called "effects principle," a less favored basis for the exercise of jurisdiction.[18] But the effects principle only provides a basis for the regulation of conduct abroad through legislation intended to reach such conduct when it substantially harms the domestic economy of the United States. *See Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690, 704-05 & n.13 (1961) (quoting *United States* v. *Sisal Sales Corp.*, 274 U.S. 274, 276 (1926)).

There are limits to the applicability of the effects principle, and the mere fact that conduct in a foreign country may have some repercussions in the United States is not sufficient to find effects substantial or direct

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tive intent by Congress to extend these statutes extraterritorially, and no court has held that any of these statutes so apply.

[18] The current version of the Restatement of Foreign Relations Law, published in 1986, emphasizes that "[t]he territorial principle is by far the most common basis for the exercise of jurisdiction to prescribe . . . ." Restatement (Third) § 402 comment c. The Restatement sets forth the bases for a state to prescribe jurisdiction in a hierarchical order: *first*, conduct within the state's own territory; *second*, the status of persons or interests present within its territory; *third*, conduct outside its territory that has "substantial effect" within its territory, and *fourth*, "the activities, interests, status or relations of its nationals outside as well as within its territory." Restatement (Third) § 402. (There is a fifth, non-traditional jurisdictional basis, recently added, relating to international terrorist activity.)

In addition, courts today continue to rely on the presumption against extraterritorial application set forth by this Court in *Foley Bros., Inc.* v. *Filardo*, 336 U.S. at 285. Thus, the failure of the Restatement (Third) to include section 38 of the Restatement (Second) of Foreign Relations Law *in haec verba* (U.S. statutes apply "only to conduct occurring within, or having effect within, the territory of the United States, unless the contrary is clearly indicated by the statute"), hardly supports the argument that territoriality is an outmoded concept under international law. *See* Lawyers Comm. Br. 5, 21.

enough to extend our laws extraterritorially. *Cf. United States* v. *Aluminum Co. of Am.*, 148 F.2d 416, 443-44 (2d Cir. 1945) (L. Hand, J.). Only conduct that has or is intended to have a direct and substantial economic effect within the United States is reached. *See* Restatement (Third) §§ 402(c), 416 comment a; *see also* § 402 comment d (discussing economic effects). Moreover, under the effects doctrine, as in other cases involving the extraterritorial application of U.S. law, the first step in the analysis remains whether Congress intended the statute to reach the conduct involved. *United States* v. *Aluminum Co. of Am.*, 148 F.2d at 443.

In cases decided on the basis of the effects principle, the United States (frequently with considerable controversy and opposition) has reached into foreign markets because the economic effect of violations of the antitrust, insider trading or securities laws in this country make territorial boundaries meaningless.[19] Application of Title VII extraterritorially, on the other hand, would reach into foreign workplaces on a day-to-day basis to impose U.S. laws, procedures and remedies on essentially local activities such as labor, health and safety practices. *See* Restatement (Third) § 414 comment c. This is an unwarranted extension of an already controversial doctrine into an area that traditionally has been recognized as being under local control.[20]

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[19] The effects doctrine has generated strong reactions from other countries in the form of diplomatic protest and the enactment of blocking statutes that place limits on compliance with the laws of another country. 1. J. Atwood & K. Brewster, *American Business Abroad* § 4.14-4.18 (2d ed. 1981 & Supp. 1990); D. Lange and G. Born, *The Extraterritorial Application of National Laws* 35 (1987); Gerber, *Beyond Balancing: International Law Restraints on the Reach of National Laws*, 10 Yale J. Int'l L., 185, 219-20 (1984). At least 16 nations have enacted such blocking statutes as "self-protection against the unilateral extraterritorial application of United States law." Rosenthal, *Jurisdictional Conflicts Between Sovereign Nations*, 19 Int'l Law. 487, 491 & n.22 (1985).

[20] The International Human Rights Law Group attempts to distinguish Title VII from labor statutes on the basis that it protects

C. The Requisite Clear Expression Of Affirmative Intent Necessary To Overcome The Presumption Against Extraterritoriality Cannot Be Found In The Negative Inference From The Alien Exemption Provision.

The EEOC argues that the alien exemption provision "clearly manifests an intention" by Congress to protect U.S. citizens with respect to their employment outside the United States and that there is "no other plausible explanation" for the presence of the alien exemption provision in Title VII. EEOC Br. 12. The alien exemption provision, however, says nothing about the coverage of U.S. employers, U.S. employees or U.S. nationals in workplaces in foreign nations, as would be required to provide for the application of Title VII to foreign workplaces, whether based upon U.S. nationality or upon traditional principles of extraterritorial jurisdiction. *See supra* 13-14. Furthermore, the alien exemption provision does have "plausible explanations" that make sense historically, textually and logically.

1. *The History Of The Alien Exemption Provision Demonstrates That Its Dual Purposes Were To Exempt Employers Of Aliens From Coverage In U.S. "Possessions" And To Confirm The Coverage Of Aliens In The United States.*

The EEOC's alien exemption argument would have the Court view Title VII as if it only applied to two geographic regions: inside any State, that is, within the

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against discrimination, an individual right. Int'l Human Rights Br. 26-28. The National Labor Relations Act, however, also protects employees against discrimination, on the grounds of union membership or non-membership. *See* 29 U.S.C. § 157 (guarantees individual employees the right to organize and form labor unions or to refrain); 29 U.S.C. § 158(a)(3) (unfair labor practice for employer to discriminate in order to encourage or discourage membership in union). Yet these individual protections do not apply to U.S. citizens in foreign countries. *See e.g., GTE Automatic Elec. Inc.*, 226 N.L.R.B. 1222 (1976) (citing *Benz* v. *Compania Naviera Hidalgo*, 353 U.S. 138 (1957)).

United States and the territories listed in the definition of "State" in the statute; and outside any State, or, as the EEOC repeatedly says "abroad"—a term found nowhere in the statute. In fact, however, the statute requires an examination of *three* distinct geographic regions: (1) inside any State, that is, within the United States and its many territories; (2) U.S. possessions, which also would include areas under the jurisdiction or sole control of the United States—an important and intended separate category when viewed against the historical derivation of the alien exemption provision; and (3) geographic regions outside any State or possession.

Aliens are included within the coverage of Title VII because they are "individuals" protected by the prohibitions against unfair employment practices in 42 U.S.C. § 2000e-2. The definition of "employer" includes all employers engaged in an industry affecting commerce, and the territory under the jurisdiction and control of the United States referred to in the definition of "commerce" includes "possessions" as well as "States" of the United States. 42 U.S.C. §§ 2000e(b), (g). The definition of "State," by contrast, covers certain territories but does not cover all possessions. 42 U.S.C. § 2000e(i). The alien exemption provides that Title VII does not extend to the employment of aliens "outside any State." Thus, employers of aliens in the possessions of the United States would be covered by Title VII but for the inclusion by Congress of the alien exemption provision that exempts them from coverage.

This reading of the alien exemption provision is consistent with and supported by the historical development of the provision. The first legislative use of an alien exemption provision was in the proposed 1949 Fair Employment Practices ("FEP") Act, H.R. 4453, governing the United States as employer and contractor.[21] The

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[21] The first FEP bills introduced contained exemptions for state and local governments, and for religious, charitable, and educa-

year before Congress considered H.R. 4453, this Court in *Vermilya-Brown Co.* v. *Connell*, 335 U.S. 377 (1948), had held that the term "possession" in the Fair Labor Stardards Act ("FLSA") included both the sovereign territory of the United States and leased bases in foreign nations that were within the sole control of the United States. Thus, the Court concluded, the protections of the FLSA extended to all individuals (including aliens) employed by private employers on U.S. leased bases in foreign nations. 335 U.S. at 390.

H.R. 4453, which covered government employers and government contractors as well as certain private employers, was one of the first FEP bills introduced after the *Vermilya-Brown* decision. Unlike previous FEP bills that included the phrase "State, Territory or possession" without definition in the legislation or accompanying committee reports, H.R. 4453 defined "possessions" to exclude "other places held by the United States by lease, under international arrangements or by military occupation." H.R. 4453, 81st Cong., 1st Sess., § 3(f) (1949). It also contained a new exemption provision that exempted from coverage "any employer with respect to the employment of aliens outside the continental United States, its territories and possessions." *Id.* § 4. H.R. 4453 thereby effectively circumvented the strained reasoning of the Court in *Vermilya-Brown*. *See* 335 U.S. at 390-409 (Jackson, J., dissenting).

Coverage of the federal government as an employer and the exemption provision for employers of aliens were retained in subsequent FEP bills introduced during the 1950's and early 1960's. The definition of "possession" continued to appear in many proposals for FEP legis-

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tional institutions, but made no reference to aliens by exemption or otherwise. *See, e.g.*, H.R. 2824, 80th Cong., 1st Sess. § 4 (1947). These bills used the phrase "State, Territory or possession" to denote their geographic scope. No definition of these terms was included in the proposed legislation, and the terms were not mentioned in hearings and reports. *See, e.g.*, H.R. Rep. No. 187, 79th Cong., 1st Sess. 2 (1945).

lation until 1962, when the term "State" was substituted for the phrase "State, Territory and possession" that appeared in earlier FEP bills. *See, e.g.*, H.R. 10,144, 87th Cong., 2d Sess. 10 (1962). "State" was defined in the same way as in the FLSA, which had been amended in 1957 for the express purpose of overruling *Vermilya-Brown* and thereby relieving employers of the potential liability created by that decision.[22] Read together, then, the definitions of "possession" and the alien exemption provisions in the FEP bills from 1949 until the early 1960's were intended to exempt employers of aliens on military bases and leased areas that, under the reasoning in *Vermilya-Brown*, were subject to U.S. jurisdiction.

In Title VII coverage of federal employees was deleted. The provision exempting employers of aliens, which had been inherited from numerous predecessor bills, nevertheless remained in Title VII. Because Title VII contained an expanded definition of the term "State," which listed the territories, but not possessions, to which Title VII extends, the purpose of the alien exemption provision remained the same: To continue to limit the impact of *Vermilya-Brown* by excluding from coverage employers of aliens in areas under U.S. control that did not meet the revised definition of "State." The congressional concern with exempting aliens employed within the possessions of the United States as a result of the *Vermilya-Brown* decision is a more likely reason for inclusion of an alien exemption provision in Title VII than the EEOC's explanation.

The EEOC argues that because the alien exemption first appeared in fair employment legislation six weeks after this Court's decision in *Foley*, "it was conceived as

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[22] Under the FLSA, "'State' means any State of the United States or the District of Columbia or any territory or possession of the United States." 29 U.S.C. § 203(c) (1978). The purpose of the 1957 amendment to the FLSA was "to exclude from any possible coverage work performed on United States bases in foreign countries." H.R. Rep. No. 1165, 85th Cong., 1st Sess. 1, 6 (1957).

a response to that decision." EEOC Br. 17. The legislative history of H.R. 4453 makes no mention whatsoever of *Foley*. But even assuming that the alien exemption provision was a response to the distinction between citizens and aliens raised in the *Foley* decision, the provision must be read in light of the geographic limitation contained in H.R. 4453. Congress would not have restricted the geographic scope of the legislation in the definitional provision and simultaneously extended it extraterritorially to U.S. citizens overseas through the alien exemption provision. It is even more illogical to assume that Congress would expressly have excluded from coverage military bases, leased areas and possessions, while silently including foreign countries over which the United States had no claim to jurisdiction, even under *Vermilya-Brown*.

There is another reason for the alien exemption provision, as the panel and *en banc* majorities in the court below noted. That explanation is found simply by reading the exemption consistently with this Court's decision in *Espinoza* v. *Farah Mfg. Co.*, 414 U.S. 86 (1973). In *Espinoza*, the Court noted that aliens in the United States are protected from discrimination both because Title VII uses the term "individual" rather than "citizen" and because of the alien exemption provision. On these two bases, the Court stated in passing that "Title VII was clearly intended to apply with respect to the employment of aliens inside any State." 414 U.S. at 95.

The EEOC now agrees with Respondents that the *Espinoza* decision stands for the proposition that "the alien exemption does *confirm* Congress's intention to provide protection to aliens within the United States" (EEOC Br. 15), but it rejects the position of the majority below that the provision would remain a "meaningful and useful part of the Act" even if Title VII were interpreted not to apply abroad. EEOC Br. 4, 14-15.

A *confirmation* of congressional intent by itself may have been quite "meaningful and useful," if not essential, in 1949 when the alien exemption provision first

appeared. Aliens had been excluded from certain domestic protective labor legislation and restricted in their employment opportunities within the United States.[23] There was considerable debate in Congress as to whether aliens in the United States should be covered by the FEP legislation. It therefore is quite likely that the alien exemption provision was intended in 1949 as a "backhanded way" of extending coverage to aliens in the United States at a time when a more direct approach might not have been successful in the Congress. *See* Kirschner, *Extraterritorial Application of Title VII of the Civil Rights Act*, 34 Lab. L. J. 394, 399-400 & n.26 (1983).[24]

In legislatively reversing this Court's decision in *Vermilya-Brown* and leaving *Foley Bros.* intact, Congress indicated that the application of U.S. labor standards to overseas areas is contrary to the best interests of both the United States and the foreign areas, *see* Rep. No. 987, 85th Cong., 1st Sess. 2 (1957), precisely the view expressed by Justice Jackson in his dissent in *Vermilya-Brown*. To attribute to Congress in 1949 or in 1964 an intent to regulate employment conditions in areas outside the jurisdiction of the United States on the basis of

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[23] As late as 1949, Japanese, Chinese, Koreans, Filipinos, and other Asians were barred from United States citizenship. Racially restrictive immigration quotas prohibited most Asians from even entering the United States. *See* M.R. Konvitz, *The Alien and the Asiatic in American Law*, 171-211 (1946).

[24] Congressman Powell, the author of H.R. 4453, was concerned about discrimination against aliens, particularly in the Panama Canal Zone. *See Hearings on H.R. 4453 before Special Subcomm. on Education and Labor*, 81st Cong., 1st Sess. 361-62 (1949). In March 1949, Congress was considering a bill to revise or eliminate many racially restrictive immigration quotas. New York Times, Mar. 2, 1949, at 20, col. 5. During consideration of this bill, Congressman Powell fought to remove immigration quotas for natives of the British West Indies, offering an amendment to this effect. 95 Cong. Rec. 1682, 1688-1981 (1949). *See also* 92 Cong. Rec. 184 (1946); 92 Cong. Rec. 887 (1946); 96 Cong. Rec. 2175 (1950).

the alien exemption provision is to completely ignore the context in which it was formulated.[25]

2. *A Negative Inference Cannot Provide The Requisite Clear, Specific Congressional Expression Of Intent Necessary For The Extraterritorial Application Of A U.S. Law.*

The EEOC argues that a negative inference, combined with the asserted broad jurisdictional provisions of Title

[25] The EEOC cites only two pieces of legislative history in support of its alien exemption argument. It cites a House Report stating that the purpose of the alien exemption "is to remove conflicts of law which might otherwise exist between the United States and a foreign nation in the employment of aliens outside the United States by an American enterprise." H.R. Rep. No. 570, 88th Cong., 1st Sess. 4 (1963); *see* EEOC Br. 16, 25. It also cites S. 1937 and its accompanying report (S. Rep. No. 867, 88th Cong., 2d Sess. (1964)) as laying to rest "any doubt" about the meaning of the alien exemption provision. EEOC Br. 17.

The House Report was written to accompany H.R. 405 by the House Labor Committee, not the House Judiciary Committee, and H.R. 405 was not the bill ultimately enacted by Congress. The language of H.R. 405 also included references to "foreign commerce" and "foreign nations" that were deleted later. *See supra* 18-20. As the panel majority noted, the impact of this sentence is further diluted by the indirect nature of the subcommittee's role in developing the legislation that became Title VII: "In short, the EEOC looks for a clear expression of intention in a negative inference arising from one paragraph of a report rendered by members of a House subcommittee that did not participate in voting the bill out of the Judiciary Committee and sending it to the full House." Pet. App. 40a-41a n.4.

S. 1937 differed substantially from Title VII as passed because it also covered government employees and government contractors regardless of their location. S. Rep. No. 867, 88th Cong., 2d Sess. 23. (1964). Thus, the alien exemption provision would have related to such employees, particularly to government contractors in overseas possessions. Moreover, the report accompanying S. 1937 explained the exemption not as an exemption of employers from coverage only in respect of the employment of aliens, but as an exemption of "U.S. employers employing citizens of foreign countries in foreign lands" (*id.* at 11), which appears to suggest that all U.S. employers who employed even a single foreign citizen in a foreign country would be exempt from coverage.

VII, was an "entirely natural" way for Congress in 1964 to express its intent to overcome the presumption against extraterritorial application. EEOC Br. 15. Congress, however, would not have left "such an important and unusual regulation [of employment in foreign nations] to be gathered from implication." *Sandberg* v. *McDonald*, 248 U.S. at 195. At the time Congress was considering Title VII in 1964, this Court had just decided *McCulloch*, in which it said that for an act of Congress to apply outside the borders of the United States, "there must be present the affirmative intention of Congress clearly expressed." *McCulloch* v. *Sociedad Nacional de Marineros de Honduras*, 372 U.S. at 21-22. Thus, if Congress had intended Title VII to apply in foreign workplaces it would have said so clearly, expressly and affirmatively.[26]

The district court decisions cited by the EEOC and amici to support the negative inference argument (EEOC Br. 14) are neither persuasive nor uniform in their holdings. Contrary to the EEOC's assertion, not all the "judicial decisions" but this one (*id.*) that have considered this issue have found that Title VII applies extraterritorially. *See EEOC* v. *Kloster Cruise Ltd.*, 53 Fair Emp. Prac. Cas. (BNA) 1229 (S.D. Fla. 1990).

Of those courts that have found extraterritorial application, all rely on *Bryant* v. *Int'l Schools Servs., Inc.* 502 F. Supp. 472 (D.N.J. 1980), *rev'd on other grounds*, 675 F.2d 562 (3d Cir. 1982), which based its reasoning on

[26] Congress certainly was aware of the need for a clear expression of intent at the time Title VII was being considered. Right after the *McCulloch* decision, the House and Senate Judiciary Committees considered and approved H.R. 9435, a bill to improve discovery procedures in international litigation. In its report, the Senate Judiciary Committee recognized the need to express clearly any intent to apply statutes extraterritorially: "Without the proposed amendment, section 1621 leaves in doubt whether it has extraterritorial applications . . . It is considered desirable to make unambiguously clear that the section applies irrespective of whether the perjury is committed in the United States or in a foreign country. . . ." S. Rep. 1580, 80th Cong., 2d Sess. 2 (1964).

dicta in a footnote in *Love* v. *Pullman Co.*, 13 Fair Emp. Prac. Cas. (BNA) 423, 426 n.4 (D. Colo. 1976), *aff'd on other grounds*, 569 F.2d 1074 (10th Cir. 1978).[27] *Bryant* was reversed on appeal, however, and the Third Circuit expressly declined to reach the question of Title VII's extraterritorial application. *Bryant* v. *Int'l. Schools Servs., Inc.*, 675 F.2d at 577 n.23. The Third Circuit later expressed doubt about the propriety of the negative inference rationale in *Cleary* v. *United States Lines, Inc.*, 728 F.2d 607, 609 (3d Cir. 1984).[28]

D. Extraterritorial Application Of Title VII Would Be Inconsistent With Its Structure And Would Necessarily Result In Coverage Of Foreign As Well As U.S. Employers In Foreign Workplaces.

The absence of congressional intent to apply Title VII extraterritorially is reflected in other provisions of Title VII. The statute as a whole indicates a domestic focus, with numerous references to states and state proceedings but no references whatsoever to foreign countries or foreign proceedings. *See, e.g.*, 42 U.S.C §§ 2000e-5, 2000e-7.

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[27] *See also Akgun* v. *Boeing Co.*, No. C89-1319D (W.D. Wash. June 7, 1990); *Seville* v. *Martin Marietta Corp.*, 638 F. Supp. 590 (D. Md. 1986).

[28] The EEOC claims that *Pennsylvania* v. *Union Gas Co.*, 109 S. Ct. 2273 (1990), supports its position that a negative inference from an exemption provision is an adequate basis from which to find a manifestation of congressional intent. EEOC Br. 12-13. The *Union Gas* case, however, involved a statutory provision that had a clear affirmative expression of intent *in addition to* the negative inference to be drawn from an exemption. In concluding that the statute "clearly evinces an intent to hold States liable in damages in federal court," the Court in *Union Gas* relied on "[t]he express inclusion of States within the statute's definition of persons and the plain statement that States are to be considered 'owners or operators' in all but very narrow circumstances, [which] together convey a message of unmistakable clarity: Congress intended that states be liable along with everyone else for cleanup costs recoverable under CERCLA." *Pennsylvania* v. *Union Gas*, 109 S. Ct. at 2278, 2280. Thus, it was not a negative inference from an exemption that led to the Court's conclusion in *Union Gas* but a combination of factors—particularly the express coverage provisions.

The EEOC attempts to justify, explain away or ignore these inconsistencies, which serves only to underline the difficulty with its position: If Congress had in fact intended to apply Title VII in foreign workplaces it would have addressed the problems raised by doing so in the language of Title VII, as it addressed similar problems concerning the states.

For example, Title VII and its legislative history reflect congressional concern with resolving conflicts between the federal law and procedures created by Title VII and the law and procedures of the states regulating fair employment practices. Section 2000h-4 provides that Title VII should not be construed to exclude the operation of state law or invalidate any state law unless inconsistent with the purposes of the Act. 42 U.S.C. 2000h-4. Section 2000e-5 requires the EEOC to "accord substantial weight" to findings of state or local authorities in proceedings under state or local law, and requires certain deference to state and local procedures. 42 U.S.C. § 2000e-5. Section 2000e-7 states that nothing in Title VII shall affect the application of state or local law unless such law requires or permits practices that would be unlawful under Title VII. 42 U.S.C. § 2000e-7.

If Title VII were intended to apply to employers in foreign workplaces, Congress would have included parallel provisions addressing the sensitive area of conflicts with foreign laws and procedures. The EEOC reasons, however, that foreign procedures and laws were "unfamiliar" to Congress in 1964 and it therefore chose not to deal with them in the same careful way it dealt with state law and procedures. EEOC Br. 30. This speculative suggestion about why Congress was silent attributes to Congress an unjustifiable lack of capacity. Congress's failure to act was not because of its supposed lack of familiarity with foreign laws and procedures but because Congress never considered the extraterritorial application of Title VII at all.[29]

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[29] The EEOC argues that the alien exemption provision is the congressional resolution of the conflicts of law that arise from

Furthermore, the EEOC's suggestion contrasts sharply with the careful consideration Congress gave to such matters in 1984 when, in amending the Age Discrimination in Employment Act, it specifically provided for potential conflicts with foreign law, first by limiting the employers to whom the ADEA would apply abroad and then by expressly addressing conflicts: "[I]t shall not be unlawful for an employer . . . to take any action otherwise prohibited . . . where such practices involve an employee in a workplace in a foreign country, and compliance with [the ADEA] would cause such employer . . . to violate the laws of the country in which such workplace is located[.]" 29 U.S.C. § 623(f).[30]

The absence of any similar statement concerning conflicts with foreign laws and procedures in either the statute or the legislative history of Title VII is especially peculiar in view of the EEOC's position that the statute extraterritorial application of Title VII. EEOC Br. 16-18. That supposed resolution, however, fails to address, much less resolve, the many significant conflicts that would arise in foreign workplaces where the law of the country in which the workplace is located applies to citizens and non-citizens alike, as is the case in Saudi Arabia. Even accepting the EEOC's interpretation of its meaning, the alien exemption provision addresses only conflicts that would arise in the application of Title VII to foreign citizens in foreign workplaces.

[30] If the EEOC is suggesting that the Bona Fide Occupational Qualification ("BFOQ") defense, 42 U.S.C. 2000e-2(e), is an adequate substitute for such specific provisions (EEOC Br. 7, 27), suffice it to say that the BFOQ defense is an inadequate tool for minimizing conflicts of law because it is extremely narrow, applying only to religion, sex and national origin (not race) and only where distinctions on one of those bases is reasonably necessary to the normal operation of a particular business or enterprise. *See Dothard* v. *Rawlinson*, 433 U.S. 321, 333 (1976); *Kern* v. *Dynalectron Corp.*, 577 F. Supp. 1196 (N.D. Texas 1983), *aff'd*, 746 F.2d 810 (5th Cir. 1984). The BFOQ defense and defenses available under the ADEA referred to by the EEOC are uncertain in their availability and application under Title VII and thus are no substitute for a clearly stated provision on conflicts with the laws of foreign nations like those in the amended ADEA.

by its own terms applies even to foreign employers of U.S. citizens in foreign countries. There is no citizenship restriction in the definition of employer ("a person engaged in an industry affecting commerce") or in the definition of employee ("an individual employed by an employer"). As the EEOC has stated, an employer is subject to Title VII "if it has employed 15 or more employees for a specified period and is engaged in an industry affecting commerce." EEOC Br. 11, 28. Thus, if Title VII reaches the activities of U.S. employers of U.S. citizens in foreign workplaces, as the EEOC argues, it necessarily would reach the activities of foreign employers of U.S. citizens as well. *Cf. Andrus* v. *Glover Constr. Co.*, 446 U.S. 608, 616-617 (1980) (additional exemptions are not to be implied absent contrary legislative intent).

Although the EEOC in its brief reluctantly concedes that application to foreign employers presents "more difficult issues" (EEOC Br. 28), it suggests that the coverage of foreign employers could be read out of Title VII. The EEOC now suggests that Title VII "could be interpreted" to embody "accepted international limits on prescriptive jurisdiction" (*id.*), even though it concluded in a very recent policy guidance that Title VII "contains no exemption from coverage for foreign employers" and that therefore Congress must have intended to cover "some foreign employers." Policy Statement No. 88-15, EEOC Compl. Man. (CCH) ¶ 2187 at 2393 (1989).[31]

[31] The EEOC reasoned in its policy guidance:

> [T]he Act contains no exemption from coverage for foreign employers even though Congress wrote numerous exemptions in the original statute and its amendments. . . . it is necessary to construe § 702 as expressing a Congressional intent to extend the coverage of Title VII to American and some foreign employers.

Policy Statement No. 88-15, EEOC Compl. Man. (CCH) ¶ 2187, 2393 (1989). The EEOC has assumed for itself the task of attempting to determine which foreign employers will be covered under Title VII. It has said it will balance a number of factors

The problem is that neither the EEOC's argument in this Court nor its 1988 policy guidance has any basis in the statutory language. By reading the definition of "employer" to mean only "American employer" by reference to the scant legislative history describing the alien exemption provision (EEOC Br. 29 n.27), the EEOC is arguing that the plain definition of "employer" in the statute does not really mean what it says. It is further suggesting that the statute can be rewritten by reliance on that early, limited legislative history relating to a different provision in a different bill (H.R. 405) or by resort to the economic effects cases that are in no way applicable here. *See supra* 32 n.25.[32]

To apply Title VII extraterritorially also is inconsistent with the venue provisions which, insofar as may be relevant here, provide for venue only in a judicial district in the state where certain matters related to the employer occurred or were located. 42 U.S.C. § 2000e-5(f)(3). While the EEOC points out that some employers operating abroad "may" meet one of these venue provisions within the United States (EEOC Br. 19), others clearly would not. For example, there would be no venue as to a U.S.-incorporated or foreign corporation with no place of business in the United States. Thus, the limitations on venue to the United States would not be so easily avoided as the EEOC suggests.

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to determine whether Title VII applies, including the foreign employer's nationality, whether the foreign employer is doing "further business" in the United States and whether the alleged discriminatory act has a connection to "the business in the United States." *Id.*

[32] In contrast to the EEOC's argument, the ACLU asserts that Congress would not have intended to apply Title VII to "alien employers of Americans abroad" because in 1964 it would have been considered "an unwarranted exercise of jurisdiction"; therefore, "[t]his interpretation should . . . be disfavored." ACLU Br. 29. *Cf. Lavrov* v. *NCR Corp.*, 600 F. Supp. 923, 931 (S.D. Ohio 1984) (foreign employers outside the United States are not "employers" covered by Title VII, because specific congressional intent is needed to extend coverage to foreign employers, citing *Benz* and *McCulloch*.)

Similarly, the investigative authority provided in the original Title VII strongly suggests that no thought was given by Congress to extraterritorial coverage. The EEOC's subpoena power originally extended only to the "State" where the witness resided or the documents sought were kept, and the EEOC could not require production beyond that State. Pub. L. No. 88-352, § 706(f), 78 Stat. 241 (1964). The provision was amended in 1972, but the current statutory language still permits the EEOC only to issue subpoenas for witnesses and documents from "any place in the United States or any Territory or possession thereof." 42 U.S.C. § 2000e-9. This language hardly suggests authorization to export Title VII's law and procedures worldwide.[33]

In order to sustain the argument that Congress in 1964 intended Title VII to apply abroad, the EEOC must ignore the absence of provisions addressing conflicts with foreign law, rewrite the definition of employer and overlook the limitations on venue and investigative authority, thus demonstrating that the structure of Title VII is not consistent with the EEOC's view that Title VII was intended to be applied extraterritorially.

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[33] The subpoena power of the EEOC becomes particularly problematic if Title VII applies either to foreign employers or even just to activities within foreign countries. The EEOC argues that similar language to that in Title VII has been interpreted to require production of documents where individuals within the United States were served with subpoenas for documents located elsewhere. EEOC Br. 20 n.12. Such "comparable statutes" have been held inadequate, however, to compel the appearance of a foreign citizen either in a foreign country or in the United States. *See, e.g., CFTC* v. *Nahas*, 738 F.2d 487 (D.C. Cir. 1984). Thus, where the investigation in a particular case involves foreign witnesses, the EEOC would lack the necessary investigative power.

E. Congress Could Not Have Intended In 1964 To Impose Our Method Of Dealing With Employment Discrimination On The Many Nations That Have Entered Into Treaties And Conventions Or Adopted Their Own Laws To Deal With Such Matters.

There are sensitive and sometimes vast cultural differences between this nation and other sovereign states, many of which already regulate employment discrimination through their own laws. At least 55 nations, including Saudi Arabia, have employment discrimination laws of their own.[34] Some nations provide greater protection than does the United States, and each nation has its own laws and procedures to deal with discrimination in its territory. The fact that the international community may share the *goal* of eliminating discrimination by adopting "many conventions deploring discrimination" and that deal specifically with employment discrimination (Int'l Human Rights Br. 46 n.9), is not support for imposing Title VII on other countries. In fact, it strongly suggests that Congress could not have intended to impose U.S. substantive and procedural law on the many nations that have ratified such treaties and conventions or enacted laws to deal with such matters in their own way.

The International Labour Organization Convention (No. 111) Concerning Discrimination in Respect of Employment and Occupation, 362 U.N.T.S. 31 (1958) ("ILO Convention 111") cited by the International Human Rights Law Group (Int'l Human Rights Br. 58), was in existence when Congress passed Title VII. ILO Convention 111—ratified by Saudi Arabia and 110 other nations but not by the United States—obligates each party "to declare and pursue a national policy designed to promote, *by methods appropriate to national conditions and practice*, equality of opportunity and treatment in respect of employment and occupation, with a view to eliminating any discrimination in respect thereof." ILO

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[34] International Labour Organization, *Legislative Services, General Subject Index 1919-1989* (1989).

Convention 111, art. 2 (emphasis added) (Int'l Human Rights Br. App. A-2). Each member undertakes "*by methods appropriate to national conditions and practice* . . . to enact such legislation . . . as may be calculated to secure the acceptance and observance of the policy." *Id.*, art. 3 (emphasis added).[35]

The Labor and Workmen Law of Saudi Arabia regulates "all employment" within the borders of Saudi-Arabia, "including that of citizens of foreign countries." J.A. 27.[36] It contains numerous substantive provisions, some of which deal with employment discrimination,[37] and "a procedural framework consisting of two judicial commissions by which aggrieved persons may vindicate their rights under the code." *Id. See* Labor and Workmen Law of Saudi Arabia, arts. 172-188. These commissions "make no distinction between citizens of Saudi Arabia and foreign nationals who work in Saudi Arabia." J.A. 27.

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[35] As a member of the ILO, the United States has a continuing obligation under article 19, section 7, of the Constitution of the ILO, to bring a Convention "before the authority or authorities within whose competence the matter lies for the enactment of legislation or other action." Although the United States is not a party to ILO Convention 111, it continues to recognize its obligation under article 19, section 7, and in fact, is presently reconsidering ratification of ILO Convention 111. 136 Cong. Rec. S1200 (daily ed. Feb. 20, 1990) (statement of Sen. Hatch). It is implicit then that the United States has an obligation not to interfere with the application of ILO Convention 111, even though the United States has not yet ratified it. *See* Constitution of the ILO, art. 26. Similarly, under article 18 of the Vienna Convention on the Law of Treaties the United States must refrain from interfering with the operation of the ILO in general and ILO Convention 111 in particular. *See* S. Exec. Doc. L., 92d Cong., 1st Sess. 6 (1971).

[36] The Labor and Workmen Law of Saudi Arabia was included in its entirety at Tab B to the Appendix to Aramco's Brief in the court below.

[37] *See* in particular Labor and Workmen Law of Saudi Arabia, arts. 22, 48, 49, 78, 80, 91, 160.

While both the EEOC and various amici argue that the application of Title VII abroad would create "no serious potential for conflicts with international norms or the laws of foreign states" (EEOC Br. 25; *see* Int'l Human Rights Br. 53-61; Lawyers Comm. Br. 28-29), just the opposite appears to be the case. Serious conflicts with the specific laws of other countries—which have chosen to deal with discrimination by enacting legislation pursuant to their treaty obligations and otherwise "by methods appropriate to national conditions and practices"—would be inevitable if Title VII were applied overseas. Congress could not have intended to create such direct conflicts between U.S. requirements and procedures for dealing with discrimination in the workplace and those of other nations.

The Governments of the United Kingdom, Canada and Australia have presented Diplomatic Notes to the United States Department of State with respect to this case, and their statements underscore precisely this point.[38] The Government of Great Britain states that the application of Title VII in the United Kingdom could give rise to a "direct conflict" with U.K. law and policy:

> [I]f the Supreme Court should now determine that Title VII has extraterritorial application, this could in some cases give rise to direct conflict with UK law and policy, especially if affirmative action requirements are imposed. Such conflict could have serious consequences for an employer who operated both in the United States and in the UK.

Diplomatic Note No. 429 from Her Britannic Majesty's Embassy (Dec. 11, 1990) (App. 6a).[39]

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[38] Diplomatic Note No. 429 from Her Britannic Majesty's Embassy, dated December 11, 1990, is included as Appendix B hereto. Diplomatic Note No. 177 from the Embassy of Canada, dated December 12, 1990, is included as Appendix C hereto. Diplomatic Note No. 370 from the Embassy of Australia, dated December 12, 1990, is included as Appendix D hereto.

[39] The Government of Canada notes that its own "law and policy in this field reflect objectives and standards *similar* to those of Title VII." Diplomatic Note No. 177 from the Embassy of Canada (Dec. 12, 1990) (App. 8a) (emphasis added). "The Government of Canada would be concerned, however, were the provisions of Title VII to be applied extraterritorially without regard to the law of the place where the conduct occurs." *Id.* It suggests that there is a genuine possibility of "conflict with the law and policy of the territorial state," at least absent sensitivity to "the principles of comity and respect for sovereignty." *Id.* The Government of Australia says almost precisely the same thing and urges that if Title VII is held to apply extraterritorially the legislation should be applied "so as to be consistent with the principles of comity and respect for sovereignty, thus avoiding any conflict with the law and practice of the territorial state." Diplomatic Note No. 370 from the Embassy of Australia (Dec. 12, 1990) (App. 10a).

"[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains." *McCulloch* v. *Sociedad Nacional de Marineros de Honduras*, 372 U.S. at 21 (quoting *Murray* v. *Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804)); Restatement (Third) § 114 reporters' note 1. In view of the treaty obligations of 111 nations—excluding our own, whose policies and values the EEOC and amici seek to impose on the rest of the world—and the views expressed by the Governments of the United Kingdom, Australia and Canada, it would be wrong to infer that Congress intended to extend Title VII to foreign workplaces.

II. THE EEOC'S CURRENT INTERPRETATION OF TITLE VII IS ENTITLED TO NO DEFERENCE BECAUSE IT IS NEITHER SUPPORTED BY THE STATUTE, CONTEMPORANEOUS WITH ENACTMENT OF TITLE VII NOR CONSISTENT WITH PRIOR POSITIONS TAKEN BY THE AGENCY.

The EEOC contends that it has "consistently construed" Title VII to apply to U.S. citizens working abroad. EEOC Br. 22. Citing a 1975 letter from the EEOC's General Counsel, 1983 testimony by its Chairman and a 1985 decision by the Commission, it argues that its administrative interpretations "reinforce" the conclusion that Congress intended Title VII to apply abroad. *Id.* at

23. The EEOC does not mention, however, its numerous other pronouncements that demonstrate it has been far from consistent in its view, over the 26 years since enactment of Title VII, as to whether Title VII applies extraterritorially.

From 1964 until 1970 the EEOC was silent on the issue of Title VII's extraterritorial application. In 1970, it issued a regulation stating:

> Title VII of the Civil Rights Act of 1964 protects all individuals, *both citizen and noncitizens, domiciled or residing in the United States*, against discrimination on the basis of race, color, religion, sex, or natural origin.

29 C.F.R. § 1606.1(c) (1970) (emphasis added); J.A. 46. This regulation was amended to delete the "both citizens and noncitizens, domiciled or residing" language in 1980, sixteen years after Congress enacted Title VII. 45 Fed. Reg. 85,633 (1980). Nothing was substituted for the deleted language, and today the regulation remains silent on the geographic reach of the statute.

In 1975, the General Counsel of the EEOC wrote a letter to the Senate Foreign Relations Committee in support of the extraterritorial application of Title VII. EEOC Br. 22. His statement, which was not reflected in the agency's policy guidelines for another 13 years, was in conflict with the agency's regulation then in force.[40]

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[40] In the same year then-Assistant Attorney General Scalia testified before a Senate Subcommittee (EEOC Br. 24) and stated that the alien exemption provision of Title VII "implies" that Title VII is "applicable to the employment of United States citizens by covered employers anywhere in the world." *Foreign Investment and Arab Boycott Legislation: Hearings Before the Subcomm. on International Finance of the Senate Comm. on Banking, Housing and Urban Affairs* ("*Senate Hearing*"), 94th Cong., 1st Sess. 165 (1975); *Discriminatory Arab Pressure on U.S. Business: Hearings Before the Subcomm. on International Trade and Commerce of the House Comm. on International Relations* ("*House Hearing*"), 94th Cong., 1st Sess. 86 (1975). In 1975, however, the EEOC and not the Justice Department had civil enforcement responsibility with respect to Title VII (*see Senate Hearing* at 165; *House Hearing* at 86), and the testimony was at variance with the position of the EEOC in 1975 that Title VII applied only to individuals "domiciled or residing in the United States." 29 C.F.R. § 1606.1(c) (1970); J.A. 46. Furthermore, the primary purpose of the testimony was to express the Administration's view that Arab boycott legislation was not needed because of the suggestion that Title VII might already fully protect U.S. citizens. Congress apparently disagreed because it approved separate antiboycott bills in 1976 and enacted legislation in 1977. *See* 50 U.S.C. App. § 2407 (prohibiting "any United States person" from refusing to employ "or otherwise discriminating against any United States person on the basis of race, religion, sex, or national origin of that person. . . .").

In 1983 the chairman of the EEOC testified before a Senate committee considering amendments to the Age Discrimination in Employment Act to the effect that Title VII applied extraterritorially to *U.S. employers* of U.S. citizens.[41] In 1985, the EEOC rendered a decision holding that Title VII "does apply to *covered employers* with respect to their employment of U.S. citizens outside the United States," despite its own recognition at the time that Title VII "contains no [statutory] provision specifically addressing its territorial reach" and that "the legislative history of the Act is similarly silent on this issue." Decision No. 85-16, Emp. Prac. Guide (CCH) § 6857 at 7072 (1985) (emphasis added).

It was not until 1988, 24 years after the passage of Title VII, that the EEOC articulated any policy on what it now asserts was the clear intent of Congress to reach either U.S. employers or "covered employers" of U.S. citizens abroad. In September 1988, immediately before the panel decision in this case was announced but after oral argument, the EEOC issued a general policy statement that Title VII applies to employers, including foreign employers, of U.S. citizens in foreign countries. Policy Statement No. 88-15, EEOC Compl. Man. (CCH) ¶ 2187 (1989). Absent any legislative history specifically dealing with the application of Title VII to U.S. citi-

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[41] *Age Discrimination and Overseas Americans, 1983: Hearing Before the Subcomm. on Aging of the Senate Committee on Labor and Human Resources*, 98th Cong., 1st Sess. 2-4 (1983) (testimony of Clarence Thomas).

zens employed abroad, the EEOC in its policy guidance drew upon the supposedly broad "commerce power" of Congress to suggest that Title VII was intended to apply to any employer "affecting commerce."

Against this background, the Court should determine the intent of Congress by using the traditional tools of statutory construction, including the presumption against extraterritorial application involved here. Any agency view of the statute that is inconsistent with that intent must be disregarded. *NLRB* v. *United Food & Commercial Workers Union*, 484 U.S. 112, 123 (1987). No deference is due to an agency's interpretation of a statute that is not supported by the language of the statute or its legislative history. *Mohasco Corp.* v. *Silver*, 447 U.S. 807 (1980); *Southeastern Community College* v. *Davis*, 442 U.S. 397, 411-12 (1979). "Courts need not defer to an administrative construction of a statute where there are 'compelling indications that it is wrong.'" *Espinoza* v. *Farah Mfg. Co.*, 414 U.S. 86, 93-94 (1973).

Similarly, agency positions that either conflict with earlier positions or that were not contemporaneous with enactment of the statute deserve no deference. *Southeastern Community College* v. *Davis*, 442 U.S. at 412 n.11; *Espinoza* v. *Farah Mfg. Co.*, 414 U.S. at 93-94; *see General Electric Co.* v. *Gilbert*, 429 U.S. 125, 142 (1976) ("[an EEOC guideline respecting Title VII] first promulgated eight years after the enactment of that Title" that "flatly contradicts" an earlier agency position "enunciated closer to the enactment of the governing statute" is not entitled to deference). The EEOC's interpretation of Title VII here has been neither contemporaneous with the statute's enactment nor consistent over the 24 years since enactment.

The jurisdictional reach of Title VII is a matter for Congress to decide. No deference need be given to an agency's position on matters such as the scope of its own jurisdiction unless its position is consistent with the administrative structure that Congress enacted. *ETSI Pipeline Project* v. *Missouri*, 484 U.S. 495, 516-17 (1988); *Mohasco Corp.* v. *Silver*, 447 U.S. at 825. *See CFTC* v. *Nahas*, 738 F.2d 487, 495 n.17 (D.C. Cir. 1984) ("judicial deference to an agency's interpretation of its investigative authority is not justified when the agency's action may have extraterritorial impact"). To defer to the EEOC here would be to permit it to speak where Congress has not.

III. SOUND POLICY REASONS SUPPORT THE JUDGMENT OF THE COURTS BELOW THAT TITLE VII SHOULD NOT BE APPLIED TO OVERSEAS WORKPLACES UNLESS CONGRESS CLEARLY INDICATES THAT IT SHOULD.

The extraterritorial application of Title VII would create serious conflicts with the laws of other countries and the operation of multinational corporations around the world. Many multinational companies employ work forces composed of individuals from many nations and religious groups. If Title VII were held to apply to United States citizens employed overseas, multiple employment systems depending upon the citizenship of particular employees would be required within companies.[42] Foreign employers,

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[42] Through various hypotheticals, Petitioner Boureslan makes the policy argument that the decision below permits U.S. companies to "launder" their discrimination by shipping employees overseas and then firing them, leaving the terminated employees with no recourse to the protections provided by Title VII. Boureslan Br. 8-15. In fact, however, the hypotheticals are already addressed under Title VII without reading into the Act an intent that it apply extraterritorially. In each hypothetical either the alleged discriminatory conduct actually takes place in the United States, or as the Seventh Circuit explained in *Pfeiffer* v. *Wm. Wrigley, Jr. Co.*, 755 F.2d 554 (7th Cir. 1985), the "relevant work station" is in the United States. A U.S. citizen working for a U.S. company in the United States subjected to discrimination while on a foreign business trip would be regarded as having a U.S. work station, with the foreign business trip but an incidental part of that U.S. employment relationship. Similarly, an employee who is denied a transfer or an overseas assignment for a discriminatory reason is the object of discrimination in the United States. *See Abrams* v. *Baylor College of Medicine*, 805 F.2d 528 (5th Cir. 1986).

to which the Act would apply by its own terms and under existing EEOC policy (*see supra* 36-37), might well choose to forego employing U.S. citizens at all in order to avoid such difficulties. *See The Bremen* v. *Zapata Off-Shore Co.*, 407 U.S. 1, 9 (1972) (the "expansion of American business and industry will hardly be encouraged if . . . we insist on a parochial concept that all disputes must be resolved under our laws and in our courts.")

The absence of any statutory guidance in treating the difficult conflicts that would arise necessarily would lead to increased litigation to resolve them. Determining the applicability of Title VII on a case-by-case basis and relying on the EEOC and the courts to "minimize conflicts of jurisdiction by exercising a jurisdictional rule of reason in individual cases," as the EEOC and the dissent below suggest (Pet. App. 25a; *see* EEOC Br. 28), would invite a needless proliferation of litigation on social and policy questions that would add to the burdens on our courts and cause unnecessary friction with friendly sovereigns.[43]

It is not enough to assert (EEOC Br. 31-32) that the 1984 amendments to the ADEA underline a congressional determination to apply anti-discrimination legislation abroad, and to urge that the holding below creates "an anomaly" that Congress never intended between the reach of Title VII and the ADEA. EEOC Pet. 12-13.[44] As the

[43] Indeed, a similar case-by-case balancing approach, at one time used by the National Labor Relations Board under the National Labor Relations Act, was rejected by this Court in *McCulloch* v. *Sociedad Nacional de Honduras*, 372 U.S. at 19, in favor of "the affirmative intention of the Congress clearly expressed." *Id.* at 22 (quoting *Benz*, 353 U.S. at 147).

[44] Reliance on the supposed "anomaly" is little more than an argument that Senator Grassley believed in 1984 that the ADEA as originally written in 1967 applied abroad because its "substantive provisions" were "worded nearly exactly as those in Title VII's" and that Title VII applied to employers of U.S. citizens abroad. 129 Cong. Rec. 34,499 (Nov. 18, 1983). Senator Grassley based his comment on two district court opinions, *Love* and *Bryant*, one of which stated that conclusion in *dicta* (*Love*) and the other of which was subsequently reversed on appeal (*Bryant*). *Id. See* discussion

EEOC has conceded, the legislative history of the 1984 ADEA amendments is not "indicative of the intent of the 1964 Congress that enacted Title VII." EEOC Pet. 13 n.10.

Far from demonstrating congressional intent in 1964, the 1984 amendments to the ADEA are an instructive example of how Congress speaks directly and specifically when it intends legislation to apply extraterritorially. In the 1984 amendments, Congress changed the ADEA's definition of employee expressly to include "any individual who is a citizen of the United States employed by an employer in a workplace in a foreign country." 29 U.S.C. § 630(f). It redefined the term "employer" to make clear that what it intended to cover was U.S. employers and only those foreign employers "controlled" by U.S. corporations. 29 U.S.C. § 623(h)(1). It expressly excluded employers "not controlled by an American employer" and expressly set out the factors constituting "control." 29 U.S.C. § 623(h)(2). And it provided a statutory defense to a discrimination charge where compliance with the ADEA would cause an employer to violate the laws of the country in which the workplace is located. 29 U.S.C. § 623(f)(1).

Thus, only Congress should decide whether particular U.S. laws should govern workplaces in foreign nations where U.S. citizens are employed. But Congress has not done so in respect of Title VII, and the court below properly declined to make the policy choice that is assigned to Congress. Congress "alone has the facilities necessary to make fairly such an important policy decision where the possibilities of international discord are

supra 33-34. Moreover, six courts of appeals said that the ADEA did not apply extraterritorially before it was amended and even the EEOC agreed. *See Age Discrimination and Overseas Americans, 1983: Hearing Before the Subcomm. on Aging of the Senate Comm. on Labor and Human Resources*, 98th Cong., 1st Sess. 1-4 (1983) (Remarks of Sen. Grassley and Testimony of Clarence Thomas).

so evident and retaliative action so certain." *Benz* v. *Compania Naviera Hidalgo*, 353 U.S. at 147.

CONCLUSION

For these reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

PAUL L. FRIEDMAN
(*Counsel of Record*)
THOMAS J. O'SULLIVAN
ANNE D. SMITH
WHITE & CASE
1747 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 872-0013
Attorneys for Respondents

Of Counsel:
JOHN D. ROADY
HUTCHESON & GRUNDY
3300 Citicorp Center
1200 Smith Street
Houston, Texas 77002

V. SCOTT KNEESE
GREGORY B. RICHARDS
BRACEWELL & PATTERSON
2900 South Tower
Pennzoil Place
Houston, Texas 77002

December 17, 1990

APPENDICES

APPENDIX A

Relevant provisions of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2000e-17:

§ 2000e. Definitions

For the purposes of this subchapter— • • •

(b) The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or any department or agency of the District of Columbia subject by statute to procedures of the competitive service (as defined in section 2102 of Title 5), or (2) a bona fide private membership club (other than a labor organization) which is exempt from taxation under section 501(c) of Title 26, except that during the first year after March 24, 1972, persons having fewer than twenty-five employees (and their agents) shall not be considered employers.

• • • •

(f) The term "employee" means an individual employed by an employer, except that the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policy making level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of

a State government, governmental agency or political subdivision.

• • • •

(g) The term "commerce" means trade, traffic, commerce, transportation, transmission, or communication among the several States; or between a State and any place outside thereof; or within the District of Columbia, or a possession of the United States; or between points in the same State but through a point outside thereof.

• • • •

(h) The term "industry affecting commerce" means any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce and includes any activity or industry "affecting commerce" within the meaning of the Labor-Management Reporting and Disclosure Act of 1959, and further includes any governmental industry, business, or activity.

• • • •

(i) The term "State" includes a State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, the Canal Zone, and Outer Continental Shelf Lands defined in the Outer Continental Shelf Lands Act.

• • • •

§ 2000e-1. Subchapter not applicable to employment of aliens outside State and individuals for performance of activities of religious corporations, associations, educational institutions, or societies

This subchapter shall not apply to an employer with respect to the employment of aliens outside any State, or to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.

§ 2000e-2. Unlawful employment practices

Employer practices

(a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Relevant provisions of the Age Discrimination Act of 1967, 29 U.S.C. §§ 621-634:

§ 623. Prohibition of age discrimination

(f) Lawful practices; age an occupational qualification; other reasonable factors; laws of foreign workplace; seniority system; employee benefit plans; discharge or discipline for good cause

It shall not be lawful for an employer, employment agency, or labor organization—

(1) to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age, or where such practices involve an employee in a workplace in a foreign country, and compliance with such subsections would cause such employer, or a corporation controlled by such employer, to violate the laws of the country in which such workplace is located;

• • • •

(h) Practices of foreign corporations controlled by American employers; foreign persons not controlled by American employers; factors determining control

(1) If an employer controls a corporation whose place of incorporation is in a foreign country, any practice by such corporation prohibited under this section shall be presumed to be such practice by such employer.

(2) The prohibitions of this section shall not apply where the employer is a foreign person not controlled by an American employer.

(3) For the purpose of this subsection the determination of whether an employer controls a corporation shall be based upon the—

(A) interrelation of operations,

(B) common management,

(C) centralized control of labor relations, and

(D) common ownership or financial control,

of the employer and the corporation.

§ 630. Definitions

For the purposes of this chapter— • • •

(f) The term "employee" means an individual employed by any employer except that the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policymaking level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency, or political subdivision. The term "employee" includes any individual who is a citizen of the United States employed by an employer in a workplace in a foreign country.

• • • •

APPENDIX B

DIPLOMATIC NOTE NO. 429

Her Britannic Majesty's Embassy present their compliments to the Department of State and have the honour to refer to the case of Boureslan v Aramco, Arabian American Oil—653—F. Supp. 629 (S.D. Tex. 1987), *aff'd.*, 857 F.2d 1014 (5th Cir. 1988), *reh'g granted, en banc*, 863 F.2d 8 (5th Cir.), and adopted *en banc* 892 F.2d 1271 (5th Cir. 1990), *cert. granted* 1990 US Lexis 4313, 59 U.S.L.W. 3243 (Oct. 1, 1990). An appeal to the Supreme Court of the United States is pending. That Court is asked to decide whether Title VII of the Civil Rights Act applies to employment discrimination outside the United States by an American corporation against an American citizen.

Like the United States Government the British Government is fully committed to the principle of non-discrimination on the grounds of race or sex. This is reflected in our legislation and practice. Nevertheless if the Supreme Court should now determine that Title VII has extraterritorial application, this could in some cases give rise to direct conflict with UK law and policy, especially if affirmative action requirements were imposed. Such conflict could have serious consequences for an employer who operated both in the United States and in the UK.

If the Supreme Court finds that as a matter of construction Title VII applies extraterritorially, the British Government hopes that the Court will conclude that it may be given extraterritorial effect only to the extent consistent with international law, particularly the principles of sovereignty and comity; and would expect the United States authorities to act consistently with these principles.

Her Britannic Majesty's Embassy avail themselves of this opportunity to renew to the Department of State the assurance of their highest consideration.

[SEAL]

11 December 1990

BRITISH EMBASSY
WASHINGTON DC

APPENDIX C

[EMBLEM]

Canadian Embassy Ambassade du Canada

Note No. 177

The Embassy of Canada presents its compliments to the Department of State, and wishes to bring to the attention of the Department its concerns respecting issues raised in the case of Boureslan v. Aramco, Arabian American Oil, 653 F. Supp. 629 (S.D. Tex. 1987), *aff'd.*, 857 F. 2d 1014 (5th Cir. 1988), *reh'g granted, en banc*, 863 F. 2d 8 (5th Cir.), and adopted, *en banc*, 892 F. 2d 1271 (5th Cir. 1990), *cert. granted*, 59 U.S.L.W. 3243 (Oct. 1, 1990) currently before the Supreme Court of the United States. The Government of Canada notes that the Court is being asked to determine whether the provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., should be applied extraterritorially to actions taken abroad against U.S. citizens by companies incorporated in the United States.

Canadian law and policy in this field reflect objectives and standards similar to those of Title VII. The Government of Canada would be concerned, however, were the provisions of Title VII to be applied extraterritorially without regard to the law of the place where the conduct occurs. If the Court decides that, as a matter of statutory interpretation, these provisions must be given extraterritorial effect, the Government of Canada would hope that guidance would be provided consistent with international law on their application outside the United States. In particular, the Government would expect that the provisions would be applied in a manner fully consistent with international law, as well as with the principles of comity and respect for sovereignty, thereby avoiding conflict with the law and policy of the territorial state.

The Embassy of Canada avails itself of this opportunity to renew to the Department of State the assurances of its highest consideration.

Washington, D.C.
December 12, 1990

[SEAL]

APPENDIX D

NOTE NO. 370

The Embassy of Australia presents its compliments to the Department of State, and has the honour to refer to the case of Boureslan v Aramco, Arabian American Oil, 653 F. Supp, 629 (S.D. Tex. 1987), *aff'd*, 857 F.2d 1014 (5th Cir. 1988), *reh'g, granted, en banc*, 863 F.2d 8 (5th Cir.), and adopted *en banc*, 892 F.2d 1271 (5th Cir. 1990), *cert granted* 1990 US Lexis 4313, 59 U S L W 3243 (Oct. 1, 1990) which is currently on appeal to the Supreme Court of the United States. The Government of Australia understands that the question to be determined by the Court is whether Title VII of the Civil Rights Act of 1964, 42 USC § 2000e et seq., should be given extraterritorial application to employment discrimination by companies incorporated in the United States against citizens of the United States overseas.

The Government of Australia is committed to objectives and standards which are similar to those of Title VII and are reflected in its law and practice in this area. Should the Court decide that, as a matter of construction, Title VII applies extraterritorially, the Government of Australia would hope that due regard would be had to international law in the application of the legislation outside the United States. It follows that the Government of Australia would expect that the legislation would be applied so as to be consistent with the principles of comity and respect for sovereignty, thus avoiding any conflict with the law and practice of the territorial state. The Government of Australia would be concerned if Title VII was applied extraterritorially without regard to the law of the place where the relevant conduct occurs.

The Embassy of Australia avails itself of this opportunity to renew to the Department of State the assurances of its highest consideration.

[SEAL]

Washington D.C.
December 12, 1990

(13) (14)

Nos. 89-1838 and 89-1845

Supreme Court, U.S.
FILED
JAN 9 1991
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In the Supreme Court of the United States

OCTOBER TERM, 1990

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
PETITIONER

v.

ARABIAN AMERICAN OIL COMPANY, ET AL.

ALI BOURESLAN, PETITIONER

v.

ARABIAN AMERICAN OIL COMPANY, ET AL.

ON WRITS OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

KENNETH W. STARR
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

TABLE OF AUTHORITIES

Cases: Page

Argentine Republic v. *Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989) 11
Atascadero State Hosp. v. *Scanlon*, 473 U.S. 234 (1985) 12
Benz v. *Compania Naviera Hidalgo, S.A.*, 353 U.S. 138 (1957) 5, 13-14
Bowles v. *Seminole Rock & Sand Co.*, 325 U.S. 410 (1945) 20
Continental Ore Co. v. *Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962) 12
Cunard S.S. Co. v. *Mellon*, 262 U.S. 100 (1923) 13
Espinoza v. *Farah Mfg. Co.*, 414 U.S. 86 (1973) 9
Fernandez v. *Wynn Oil Co.*, 653 F.2d 1273 (9th Cir. 1981) 18
Foley Bros. v. *Filardo*, 336 U.S. 281 (1949) 2, 8, 11, 13
Ford Motor Credit Co. v. *Milhollin*, 444 U.S. 555 (1980) 20
FTC v. *Compagnie de Saint-Gobain-Pont-a-Mousson*, 636 F.2d 1300 (D.C. Cir. 1980) 10
INS v. *Stanisic*, 395 U.S. 62 (1969) 20
Lauritzen v. *Larsen*, 345 U.S. 571 (1953) 15
Matsushita Elec. Indus. Co. v. *Zenith Radio Corp.*, 475 U.S. 574 (1986) 12
McCulloch v. *Sociedad Nacional*, 372 U.S. 10 (1963) 13, 14
Pittston Coal Group v. *Sebben*, 488 U.S. 105 (1988) 12
Robertson v. *Methow Valley Citizens Council*, 109 S. Ct. 1835 (1989) 20
SEC v. *International Swiss Investments Corp.*, 895 F.2d 1272 (9th Cir. 1990) 10
Sandberg v. *McDonald*, 248 U.S. 185 (1918) 13
Schoenbaum v. *Firstbrook*, 405 F.2d 200, modified, 405 F.2d 215 (2d Cir. 1968), cert. denied, 395 U.S. 906 (1969) 12
Skiriotes v. *Florida*, 313 U.S. 69 (1941) 16
Steele v. *Bulova Watch Co.*, 344 U.S. 280 (1952) 16
Udall v. *Tallman*, 380 U.S. 1 (1965) 20

Cases—Continued: Page

United States v. *Baker*, 609 F.2d 134 (5th Cir. 1980) 13
United States v. *Wright-Barker*, 784 F.2d 161 (3d Cir. 1986) 13
Vermilya-Brown Co. v. *Connell*, 335 U.S. 377 (1948) 6, 8, 16
Weinberger v. *Rossi*, 456 U.S. 28 (1982) 15
Wirtz v. *Malthor, Inc.*, 391 F.2d 1 (9th Cir. 1968) 7

Constitution, statutes and regulations:

U.S. Const.:
Art. I, § 8, Cl. 3 (Commerce Clause) 7
Amend. XI 12
Act of Aug. 30, 1957, Pub. L. No. 85-231, § 1, 71 Stat. 514 6
Age Discrimination in Employment Act, 29 U.S.C. 621 *et seq.*:
29 U.S.C. 623(a) 16
29 U.S.C. 623(f) 10
29 U.S.C. 623(h) 16
29 U.S.C. 626(a) 10
29 U.S.C. 630(f) 16
29 U.S.C. 633 10
Civil Rights Act of 1964, Tit. VII, 42 U.S.C. 2000e *et seq.*:
42 U.S.C. 2000e(b) 2
42 U.S.C. 2000e(g) 2, 3
42 U.S.C. 2000e(h) 2
42 U.S.C. 2000e(i) 3
42 U.S.C. 2000e-1 ..... 1, 3
42 U.S.C. 2000e-2(a) 2
42 U.S.C. 2000e-9 10
42 U.S.C. 2000e-16(a) 16
Fair Labor Standards Act of 1938, 29 U.S.C. 201 *et seq.*:
29 U.S.C. 209 10
29 U.S.C. 213(f) 2
Labor-Management Relations Act, 1947, 29 U.S.C. 141 *et seq.* 5
29 U.S.C. 161(1) 10

Regulations—Continued: Page

Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. 401 *et seq.*:
29 U.S.C. 402(c) 5
5 U.S.C. 7201 note 16
15 U.S.C. 49 10
22 U.S.C. 5001(5) 16
22 U.S.C. 5034-5035(a) 16
50 U.S.C. App. 2407(a)(1)(B) 16
50 U.S.C. App. 2415(2) 16
Exec. Order No. 11,246, § 204, 3 C.F.R. 342 (1964-1965 comp.) 17
29 C.F.R. 1606.1(c) (1971) 19
41 C.F.R. 60-1.5(a)(3) 17

Miscellaneous:

110 Cong. Rec. (1964):
p. 1528 3
p. 2737 3
p. 7212 3
p. 12,721 4
p. 12,811 4
p. 12,818 4
H.R. 4453, 81st Cong., 1st Sess. (1949) 6, 7
H.R. 405, 88th Cong., 1st Sess. (1963) 4
H.R. 7152, 88th Cong., 1st Sess. (1963) 4
1 Restatement (Third) of the Foreign Relations Law of the United States (1986) 17

In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 89-1838

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
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v.

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ON WRITS OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

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1. As respondents recognize (Resp. Br. 10), this case presents an issue of statutory construction: whether Title VII prohibits discrimination by an American employer against an American citizen outside of the United States. The text of the statute, given its plain and ordinary meaning, prohibits such discrimination. Title VII's broad jurisdictional provisions reach discrimination abroad by American employers; the exemption with respect to *aliens* employed "outside any State," 42 U.S.C. 2000e-1, establishes that the statute was intended to apply to American *citizens* outside any State; and the re-

mainder of Title VII is consistent with that interpretation.

Respondents' answers to each part of this showing are unconvincing. Further, there is no merit to the unifying theme of respondents' brief—an attempt to recast the presumption against extraterritoriality from "a valid approach whereby unexpressed congressional intent may be ascertained," *Foley Bros.* v. *Filardo*, 336 U.S. 281, 285 (1949), into a "strong presumption" (Resp. Br. 6, 12) abrogating customary principles of statutory interpretation.

a. Respondents contend (Resp. Br. 17-25) that Title VII's definition of "commerce" does not reach workplaces outside the United States. They are wrong. The statute's jurisdictional provisions draw no distinction between workplaces inside and outside this country. To the contrary, Title VII prohibits "unlawful employment practice[s]" by "an employer engaged in an industry affecting commerce," and "commerce" includes "trade, traffic, commerce, transportation, transmission, or communication among the several States; or between a State and any place outside thereof." 42 U.S.C. 2000e(b), (g), (h), 2000e-2(a). These broad provisions make the statute's applicability to discrimination dependent on whether an employer is engaged in an industry affecting commerce—not on where the discrimination occurs.[1]

The jurisdictional provisions of Title VII were carefully framed; when Congress intended to limit Title VII's application to employment at a particular place, it expressed that intention in precise language tailored to the statute's scheme of coverage. That explains why the alien exemption is framed as it is. On the heels of the broad definition of "employer," that exemption provides that

[1] There is nothing in Title VII that is comparable, for instance, to Section 13(f) of the Fair Labor Standards Act, 29 U.S.C. 213(f), which provides that the Act "shall not apply with respect to any employee whose services during the workweek are performed in a workplace within a foreign country * * *." It was the ADEA's incorporation of this provision that led courts to conclude that it did not apply extraterritorially. See EEOC Br. 31 n.29.

the Act shall not apply to "an employer" with respect to the employment of aliens outside any State, 42 U.S.C. 2000e-1.

The fact that Title VII's jurisdictional provisions do not use the term "foreign commerce" or "foreign nations" does not suggest, as respondents contend (Resp. Br. 17-18), that the statute reaches only commerce within the limits of the United States, its territories, and possessions. For one thing, respondents themselves say that the inclusion of those would-be magic words would not alter their interpretation of the statute. *Id.* at 19. But more fundamentally, commerce between "a State and *any place outside thereof*," 42 U.S.C. 2000e(g) (emphasis added), plainly includes commerce with foreign nations; indeed, since Title VII defines "States" to include States, the District of Columbia, and specified territories (42 U.S.C. 2000e(i)), the statute must be referring to areas beyond the territorial limits of the United States.[2] Respondents' assertion that this clause "provide[s] the jurisdictional nexus required to regulate commerce that is not wholly within a single state, presumably as it affects both interstate and foreign commerce" but not to "regulate conduct exclusively *within* a foreign country" (Resp. Br. 21 n.14) finds no support in the language of the statute.

[2] In the House, Representative Celler introduced a memorandum stating that "Title VII covers employers engaged in industries affecting commerce, that is to say, interstate and foreign commerce and commerce within the District of Columbia and the possessions." 110 Cong. Rec. 1528 (1964). Accord *id.* at 2737 (remarks of Rep. Libonati). Respondents rely (Resp. Br. 19-20) on an ambiguous memorandum introduced into the *Congressional Record* during debate in the Senate. That memorandum stated both that commerce for purposes of Title VII "is, generally speaking, interstate commerce, but includes commerce within U.S. possessions and the District of Columbia" and that such commerce "is, in short, that commerce to which the regulatory power of Congress extends under the Constitution * * *." 110 Cong. Rec. 7212 (1964). Nothing in the Senate memorandum warrants a departure from the unambiguous statutory text. Respondents concede that Congress "has the power to legislate extraterritorially" (Resp. Br. 10).

Nor does the deletion in the Senate of legislative declarations referring to (among other things) "commerce * * * with foreign nations" manifest any intention to restrict Title VII's scope. Compare Resp. Br. 18-19.[3] The substitute amendment that deleted the declarations made no material change in Title VII's operative provisions—the definitions of "employer," "commerce," and "industry affecting commerce" and provisions prohibiting "unlawful employment practices"—that determine the discrimination to which the statute applies. Indeed, in explaining the amendment, Senator Humphrey stated that "[t]he basic coverage and the substantive prohibitions of the title remain almost unchanged" and that "[t]he title continues to apply to employers * * * in industries affecting commerce." 110 Cong. Rec. 12,721 (1964). Significantly, the deletion was not restricted to the declarations' reference to "foreign nations." That reference, a parallel reference to "commerce among the States" (110 Cong. Rec. 12,811 (1964)), a statement that "it is the national policy to protect the right of the individual to be free from * * * discrimination" (*ibid.*), and other declarations were jettisoned en masse. At all events, the motivation behind the deletion was plainly directed only at the declarations as such, not at the operative provisions of the statute; whatever that motivation was, the deletion was no more an attempt to alter the statute's application to foreign commerce than it was an indication that Congress had somehow abandoned the goal of prohibiting discrimination affecting "commerce among the States."

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[3] The declarations were initially included in Section 2 of H.R. 405, 88th Cong., 1st Sess. (1963). They were amended when H.R. 405 was incorporated into H.R. 7152, 88th Cong., 1st Sess. (1963), the bill ultimately enacted, as amended, as Title VII. As part of the compromise amendment (No. 656) that was substituted in the Senate for the version of H.R. 7152 passed by the House, the declarations were deleted. See 110 Cong. Rec. 12,811, 12,818 (1964). The only mention of the deletion was a terse statement in a memorandum introduced by Senate Dirksen into the *Congressional Record*: "Section 701: This section consisting of findings and declaration of policy is deleted in its entirety." 110 Cong. Rec. 12,818 (1964).

Finally, Title VII's reference to the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. 402(c), which in turn incorporates the Labor-Management Relations Act of 1947, 29 U.S.C. 141 *et seq.*, does not speak to Title VII's application to discrimination by American employers against American citizens abroad. See Resp. Br. 22-23. In *Benz* v. *Compania Naviera Hidalgo, S.A.*, 353 U.S. 138, 143 (1957), on which respondents heavily rely, this Court held that the LMRA does not cover "labor disputes between nationals of other countries operating ships under foreign laws." This is not a case, like *Benz*, involving foreign nationals and foreign employers. See pp. 13-15, *infra*. In fact, because *Benz* involved a labor dispute aboard a ship present in American territorial waters, it underscores the force that the participants' *nationality*—the basis for Title VII's application to this case—had in determining the applicability of American law.

b. Respondents' efforts to limit the significance of the alien exemption are equally implausible. In their view, the provision serves the "dual purposes" of "exempt[ing] employers of aliens from coverage in U.S. 'possessions' and * * * confirm[ing] the coverage of aliens in the United States" (Resp. Br. 26; see *id.* at 7). Neither alternative withstands analysis, and no reasonable draftsman could have conceived of the alien exemption as a means of accomplishing both at once.

i. Respondents' first explanation of the exemption involves a labyrinthine expedition into the far recesses of legislative history in order to attribute to Congress an intention to divide the world into three parts: (1) "States" (as defined by the Act), in which both aliens and American citizens are entitled to Title VII's protection; (2) "possessions," consisting of military bases and leased areas on foreign soil, in which American citizens, but not aliens, are protected; and (3) all other areas, in which Title VII does not apply at all. Resp. Br. 27. At the outset, it bears emphasis that this tripartite division finds no support in the statutory text. To the contrary, the alien exemption draws a line between employment

within a "State" and employment "outside any State." Confronted with that express division, respondents nonetheless offer no evidence whatever (1) that any member of the Congress that enacted Title VII viewed Americans employed abroad but outside possessions to be less deserving of protection than those employed inside possessions, or (2) that the alien exemption was conceived as a means of communicating that policy choice.

The historical record provides not a shred of support for respondents' speculation that the alien exemption was initially drafted—and later understood by the 1964 Congress—to limit Title VII's protection of Americans abroad to possessions of the type at issue in *Vermilya-Brown Co.* v. *Connell*, 335 U.S. 377 (1948). In *Vermilya-Brown*, this Court held that the Fair Labor Standards Act was applicable to both aliens and American citizens employed on a Lend Lease base in Bermuda. Coverage for that type of possession continued until 1957, when Congress narrowed the FLSA's coverage to the States and specified other jurisdictions. See Act of Aug. 30, 1957, Pub. L. No. 85-231, § 1, 71 Stat. 514. In those locations, as before, aliens and citizens were both entitled to the benefits of the Act; elsewhere, including American possessions, neither category of persons was protected.

Fair employment bills introduced before and after 1957 did not follow the FLSA model. The alien exemption—which appeared in H.R. 4453, 81st Cong., 1st Sess. (1949), a few weeks after this Court's decision in *Foley Bros.*—distinguished between American citizens and aliens with respect to employment anywhere outside a specified list of jurisdictions. Possessions of the type at issue in *Vermilya-Brown* were excluded from the list of jurisdictions in which aliens would be covered, but that does not suggest that those possessions were to be the only sanctuaries abroad in which Americans would be protected from discrimination. After 1957, when Congress overturned *Vermilya-Brown* by withdrawing FLSA coverage from Americans and aliens working in American possessions, there was no corresponding change in fair employment

bills up to the passage of Title VII. Respondents offer no evidence whatever that any member of the Congresses that considered these bills perceived a connection between the FLSA and employment discrimination legislation; to the contrary, fair employment bills, including Title VII, did not include a provision limiting coverage for Americans comparable to the FLSA amendment that Congress fashioned, after some delay, in response to *Vermilya-Brown*.[4]

In an effort to buttress their assertion that the alien exemption focused on American possessions, respondents also suggest that the fair employment bills in which the exemption first appeared were focused upon federal employment. We are told, for instance, that the first bill to contain the alien exemption (H.R. 4453, *supra*) was a bill that would have "govern[ed] the United States as employer and contractor" and "covered government employers and government contractors as well as certain private employers." Resp. Br. 27, 28; see also *id.* at 28-29, 32 n.25. Respondents' emphasis on the proposed legislation's applicability to federal employment—which is calculated to supply a motive for special treatment of U.S. government possessions—is both misleading and irrelevant.

As reported by the House Committee on Education and Labor, H.R. 4453 would have been applicable to any employer "engaged in commerce having in his employ fifty

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[4] The absence of such a parallel should come as no surprise. The FLSA is designed to raise standards for workers generally by denying employers the competitive advantage that they might otherwise derive from paying low wages or requiring long hours. Indeed, employers who violate the FLSA are required to remit to the government any damages corresponding to employees who cannot be located. See, *e.g.*, *Wirtz* v. *Malthor, Inc.*, 391 F.2d 1, 3 (9th Cir. 1968). This statutory policy is dependent upon the statute's applying to all employees of a covered employer. Title VII, by contrast, is designed to protect potential victims of discrimination from its invidious effects—in terms of the Commerce Clause, to protect commerce from the losses flowing from underuse of qualified personnel because of invidious discrimination. That goal does not suggest a coverage scheme identical to the FLSA's.

or more individuals" (excluding state and local governments and certain nonprofit institutions), as well as the federal government. Thus, from the time in 1949 when the alien exemption first made its appearance in proposed legislation, fair employment bills were drafted to provide broad protection to American citizens employed by private employers—whether or not that employment had any relationship to the federal government. Indeed, in 1964, Congress chose not to extend Title VII to federal employment, thus confirming that the alien exemption was not meant to be a remarkably indirect way of targeting federal facilities abroad.[5]

In the final analysis, the first of respondents' two explanations of the alien exemption treats that provision as a very odd historical remnant—a provision drafted with a view to a 1948 decision construing the FLSA, for inclusion in a bill focused on federal employment, which was unthinkingly carried forward into civil rights legislation that neither paralleled the FLSA nor covered federal employees. This tortuous use of unconnected materials should not obscure one clear, salient point—the 1964 Congress was not indifferent to the meaning of one of the very few exceptions to Title VII. The exemption played a logical and important role—which was clear from its language and confirmed by committee reports, see EEOC Br. 16—in the scheme that Congress actually enacted. The exemption does precisely what it says; it limits Title VII's application as to *aliens* (and thus establishes the statute's application to American citizens) in all territory "outside any State."

[5] Significantly, respondents' interpretation of the exemption is inconsistent with their own view of the principles of statutory interpretation applicable to this case. The United States does not exercise territorial sovereignty over the "possessions" on which respondents' interpretation focuses. Thus, under respondents' theory, the presumption against extraterritoriality should be as potent a bar to Title VII within those possessions as it is in other foreign territory. See *Vermilya-Brown Co.* v. *Connell*, 335 U.S. at 381 (noting that application of FLSA to Lend Lease base involved regulation "outside the territorial jurisdiction of the United States"); *Foley Bros.* v. *Filardo*, 336 U.S. at 285 (explaining *Vermilya-Brown* as a case in which the presumption was satisfied).

ii. We explain in our opening brief why the alien exemption could not have been conceived as a backhanded means of extending protection to aliens employed in the United States. EEOC Br. 14-15. Respondents nevertheless persist in their view that the alien exemption could have been included in Title VII as a "meaningful and useful way to confirm" that coverage. Resp. Br. 8; see *id* at 30-31. But this would have been odd draftsmanship in the extreme; Congress does not include exemptions in legislation for the purpose of providing courts indirectly with material to guide the interpretation of other provisions. The function of the alien exemption is simple and straightforward: to withdraw statutory coverage from aliens employed "outside any State." In so doing, the exemption demonstrates—as a matter of statutory construction—both that the statute covers aliens within the United States (see *Espinoza* v. *Farah Mfg. Co.*, 414 U.S. 86, 95 (1973)) and, *with equal force*, that Americans employed abroad are protected.

c. Respondents identify various issues that they believe Congress "would have" addressed differently if it had intended to apply Title VII to discrimination abroad by American employers against American citizens. Resp. Br. 34-39. But the features of Title VII that respondents portray as statutory holes are not at all incompatible with its application to Americans employed by American employers abroad. As we demonstrate in our opening brief (EEOC Br. 18-22, 29-30), Title VII's basic enforcement framework is available to an American citizen who, like Ali Boureslan, alleges that he was the victim of discrimination by an American employer outside of the United States. Such an individual may file a charge with the EEOC; the Commission is authorized to conduct an investigation, issue or withhold a reasonable cause determination, attempt conciliation, and issue a right to sue letter; and, when either the individual or the Commission has commenced an action, judicial processes are available to obtain evidence, fashion a remedy, and enforce it.

Beyond this, the matters respondents raise present questions of policy. It is up to Congress to determine whether procedural deference afforded to state fair employment proceedings should be accompanied by "parallel provisions" addressing foreign laws (Resp. Br. 35); whether the alien exemption or the BFOQ defense is "an inadequate tool for minimizing conflicts of law" (*id.* at 36 n.30; see *id.* at 35-36 n.29); whether a broader choice of venue should be available to plaintiffs (*id.* at 38); and whether it would be wise to provide the Commission with broader subpoena power (*id.* at 39 & n.33).[6] For the reasons stated in our opening brief, we see nothing anomalous in the answers Title VII supplies to these questions. In fact, many of those answers are the same as those provided by the ADEA, a statute respondents now trumpet as reflecting "careful consideration" (Resp. Br. 36) of extraterritorial application of law.[7] But in any event, respondents' assertions regarding what Congress "would have" done do not undercut the conclusion that flows from the statute's jurisdictional provisions and the alien exemption.

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[6] Respondents are mistaken in their contention that the scope of an agency's subpoena power is indicative of a limitation on the extraterritorial application of the statute. The assertion of claims arising from foreign conduct is entirely distinct from the service of compulsory process on foreign territory. Unlike the service of a complaint on foreign soil (which merely gives notice of a claim), other nations may regard the service of compulsory process as a violation of their sovereignty. See *SEC* v. *International Swiss Investments Corp.*, 895 F.2d 1272, 1276 (9th Cir. 1990); see *FTC* v. *Compagnie de Saint-Gobain-Pont-a-Mousson*, 636 F.2d 1300, 1313 (D.C. Cir. 1980).

[7] The ADEA, like Title VII, provides for procedural deference to state proceedings (29 U.S.C. 633), but it provides no comparable deference to foreign age discrimination proceedings. So too, the EEOC's subpoena power is substantially identical under both statutes. Compare 29 U.S.C. 161(1) (incorporated in 42 U.S.C. 2000e-9) with 15 U.S.C. 49 (incorporated in 29 U.S.C. 209, 626(a)). In addition, Title VII has been construed to provide defenses similar to that conferred by 29 U.S.C. 623(f). See EEOC Br. 27-28 & nn.23-24.

d. The principal refrain of respondents' brief is that the presumption against extraterritoriality establishes a very demanding clear-statement test. In respondents' view, that canon of construction is a "strong presumption" (Resp. Br. 6, 12) requiring a "clear and affirmative expression" (*e.g.*, *id.* at 7, 13, 14, 17, 21) of intention to reach conduct outside the United States. A "negative inference," respondents argue (*id.* at 7, 11, 32), is insufficient. Not content with arguing for their understanding of that canon, respondents suggest that we share it. *Id.* at 9-10. They err in both respects. We believe that the language of Title VII would satisfy a stringent formulation of the presumption; nevertheless, respondents substantially overstate the force of that canon.

i. In *Foley Bros.*, this Court described the presumption against extraterritoriality as follows (336 U.S. at 285):

> The canon of construction which teaches that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States * * * is a valid approach whereby unexpressed congressional intent may be ascertained.

That same formulation was repeated in the most recent decision in which this Court referred to the presumption. *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U.S. 428, 440-441 (1989). By its terms, this canon serves only to clarify "unexpressed congressional intent," and places no limitations on the form that the showing of "contrary intent" may take.

The canon described in *Foley Bros.* is not, therefore, a "strong presumption" (Resp. Br. 6, 12) suspending customary principles of statutory interpretation. As this Court's decisions reflect, the requisite intention to apply a statute abroad may be found in the language of the statute—informed by due consideration of the statute's purposes, legislative history, administrative interpreta-

tions, and other pertinent materials.[8] The presumption does not impose drafting requirements on Congress, compelling it to use a particular form in order to assure that a statute will apply abroad. Nor does it mandate a search within a statute for a single discrete provision that respondents might characterize as "affirmative" rather than "negative." The combination of broad jurisdictional provisions and an exemption for aliens abroad (meeting the precise concern expressed in *Foley Bros.*) is an entirely natural and sufficient means of expressing an intention to cover Americans employed abroad.

Finally, in the face of the language of Title VII, the presumption does not require a demonstration that members of Congress engaged in some measure of debate over extraterritorial applications (see Resp. Br. 11, 20 n.12) showing members of the legislature "actually thought about" the question (*id.* at 5-6; see *id.* at 8, 10, 11). The scope of a statute is not limited to applications mentioned in its legislative history, *Pittston Coal Group* v. *Sebben*, 488 U.S. 105, 115 (1988). The *Foley Bros.* canon does not justify respondents' departures from basic principles of statutory interpretation.[9]

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[8] This Court has never suggested, for instance, that the *Foley Bros.* canon is comparable to the clear-statement principle by which the Court determines whether Congress has intended to impose liability on the States, notwithstanding the Eleventh Amendment. In light of "[t]he fundamental nature of the interests implicated by the Eleventh Amendment," "Congress may abrogate the States' constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute." *Atascadero State Hosp.* v. *Scanlon*, 473 U.S. 234, 242 (1985).

[9] We do share common ground with the respondents as to the reach of the antitrust and securities laws. We agree that Congress intended these statutes, which provide for both civil and criminal enforcement, to extend extraterritorially (Resp. Br. 25). See, *e.g.*, *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 582 n.6 (1986); *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690, 704-705 (1962); *Schoenbaum* v. *Firstbrook*, 405 F.2d 200, 206, modified on other grounds, 405 F.2d 215 (2d Cir. 1968), cert. denied, 395 U.S. 906 (1969). Various other criminal statutes have also been given extraterritorial effect. See, *e.g.*, *United States* v. *Wright-Barker*, 784 F.2d 161 (3d Cir. 1986); *United States* v. *Baker*, 609 F.2d 134 (5th Cir. 1980).

ii. Respondents derive their more demanding version of the *Foley Bros.* canon from heavily edited quotations from cases in which this Court discussed the application of American law to *aliens* on *foreign soil* or *foreign flag vessels*. For instance, in *Foley Bros.*, this Court insisted on "a clearly expressed purpose" to apply the Eight Hour Law to *Iranian nationals in Iran* (336 U.S. at 286 (emphasis added)):

> No distinction is drawn [in the Eight-Hour Law] between laborers who are aliens and those who are citizens of the United States. Unless we are to read such a distinction into the statute we should be forced to conclude, under respondent's reasoning, that Congress intended *to regulate the working hours of a citizen of Iran who chanced to be employed on a public work of the United States in that foreign land.* Such a conclusion would be logically inescapable although labor conditions in Iran were known to be wholly dissimilar to those in the United States and wholly beyond the control of this nation. An intention *so to regulate* labor conditions which are the primary concern of a foreign country should not be attributed to Congress in the absence of a clearly expressed purpose.[10]

Title VII does not seek "so to regulate" labor conditions of aliens employed in a foreign land.

Similarly, *Benz*, *McCulloch* v. *Sociedad Nacional*, 372 U.S. 10 (1963), and *Sandberg* v. *McDonald*, 248 U.S. 185, 195 (1918), all involved attempts to apply American law to aliens employed on foreign flag vessels (which the law views as analogous to foreign soil, see, *e.g.*, *Cunard S.S. Co.* v. *Mellon*, 262 U.S. 100, 123-124 (1923)). In *Benz*, the Court concluded, "[o]ur study of

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[10] Respondents' quotation from *Foley Bros.* omits the word "so" and the material to which it refers, and also presents the last sentence quoted above as an elaboration on the canon of construction appearing a page earlier in the Court's opinion. See Resp. Br. 14-15.

[the LMRA] leaves us convinced that Congress did not fashion it to resolve labor disputes between nationals of other countries operating ships under foreign laws." 353 U.S. at 143. As in *Foley Bros.*, the Court's reference to a clear and affirmative statement of Congress's intention was specifically linked to that type of application (353 U.S. at 146-147):

> The seamen agreed in Germany to work on the foreign ship under British articles. We cannot read into the Labor Management Relations Act an intent to change the contractual provisions made by these parties. For us to run interference in such a delicate field of international relations there must be present the affirmative intention of the Congress clearly expressed.

Likewise, in *McCulloch*, the Court framed the "basic" question as "whether [the NLRA] as written was intended to have any application to foreign registered vessels employing alien seamen." 372 U.S. at 19. Adhering to the holding in *Benz*, the Court in *McCulloch* found that the NLRA failed to describe "the boundaries of the Act as including foreign-flag vessels manned by alien crews." *Id.* at 20. The Court quoted from *Benz* after describing how application of the NLRA would result in a "head-on" collision with Honduran law governing Honduran crews aboard Honduran flag vessels.[11]

This case involves no comparable attempt to extend American law to alien employees abroad; to the contrary, the alien exemption precludes any such applications of Title VII. Thus, the skepticism the Court expressed in *Foley Bros.*, *Benz*, and *McCulloch* regarding the reach of American law has no applicability here. There is no rea-

[11] In *Benz* and *McCulloch*, the application of American law to labor disputes involving aliens employed aboard foreign-flag vessels might well have violated international law. See *McCulloch*, 372 U.S. at 21 (referring to "the admonition of Mr. Chief Justice Marshall in *The Charming Betsy*, 2 Cranch 64, 118 (1804), that 'an act of congress ought never to be construed to violate the law of nations if any other possible construction remains . . . .'"). That interpretive principle has no application in this case.

son to question the conclusion flowing from Title VII's express provisions that Congress intended to protect Americans employed outside the United States from discrimination by American employers.[12]

2. Respondents and their *amici* advance a varied assortment of claims regarding the role that international law should play in this case. Our fundamental point in response is this: international law does not foreclose the extraterritorial application of Title VII in the context of U.S. employers which discriminate against U.S. citizens.

a. In the first place, international law is relevant to this case only as an aid to the interpretation of Title VII. As a general rule, statutes are construed, when fairly possible, to conform with established principles of international law. See, *e.g.*, *Weinberger* v. *Rossi*, 456 U.S. 28, 32 (1982); *Lauritzen* v. *Larsen*, 345 U.S. 571, 577 (1953). There is, however, no difficulty in construing Title VII to conform to well-established international norms.

The only issue of international law presented by this case is whether the United States has jurisdiction to prescribe a rule prohibiting discrimination abroad by American employers against American citizens. Respondents' position is that Title VII may *never* be applied to such discrimination. Yet, they admit that the ADEA—the validity of which they do not contest under international law—does precisely that. And rightly so. As this Court has noted, "the United States is not debarred by any rule of law from governing the conduct of its own citizens * * * in foreign countries when the rights of other nations

[12] Respondents argue that there is no meaningful distinction between the individual right to freedom from discrimination protected by Title VII and the rights protected by federal labor legislation. Resp. Br. 25-26 n.20. Employee rights under the NLRA, however, are designed to facilitate *collective action* by employees. The individual rights needed to facilitate those activities obviously cannot be conferred selectively on Americans abroad; it would make little sense to confer the rights to join a union, organize, elect representatives, and strike on less than all members of a bargaining unit.

or their nationals are not infringed." *Steele* v. *Bulova Watch Co.*, 344 U.S. 280, 285-286 (1952); see *Skiriotes* v. *Florida*, 313 U.S. 69, 73 (1941); *Vermilya-Brown Co.* v. *Connell*, 335 U.S. 377, 381 (1948). Recognition of authority to prescribe law for nationals does not violate any "fundamental concept of sovereignty" (Resp. Br. 12) and is not "inconsistent with the international principle of national sovereignty" (Rule of Law Comm. Br. 5). The international community does not adhere to any ironclad rule "that nations have the right to regulate conduct within their own borders and not within the borders of another sovereign" (Resp. Br. 12). Likewise, the exercise of prescriptive jurisdiction to prohibit discrimination by American employers against American citizens cannot be regarded as "imposing Title VII on other countries" (*id.* at 40; see *id.* at 8).

The fact that the authors of the Restatement characterize nationality as an "exceptional basis" for prescriptive jurisdiction does not suggest that it is in any way disfavored. Compare Resp. Br. 4, 13, 24 n.18; Rule of Law Comm. Br. 8, 9. In fact, in the area of anti-discrimination legislation, nationality has come to be the customary basis for the extraterritorial application of American law.[13] Although respondents and their *amici*

[13] See 5 U.S.C. 7201 note (prohibiting discrimination, unless required by treaty, by Department of Defense against American citizens at foreign military bases); 22 U.S.C. 5001(5), 5034-5035(a) ("requiring national[s] of the United States" employing more than 25 persons to conform to a "Code of Conduct" regulating employment practices in South Africa); 29 U.S.C. 623(a) and (h), 630(f) (prohibiting age discrimination against American citizens employed abroad by American corporations or foreign corporations controlled by American employers); 42 U.S.C. 2000e-16(a) (extending protection from discrimination by the federal government to "[a]ll personnel actions affecting employees or applicants for employment (except with regard to aliens employed outside the limits of the United States")); 50 U.S.C. App. 2407(a)(1)(B), 2415(2) (directing the President to promulgate regulations prohibiting any "United States person" from engaging in employment discrimination, in compliance with foreign boycotts, against "United States person[s]"). Respondents and their *amici* downplay or ignore these statutes in their discussion of the nationality principle. Resp. Br. 13; Rule of Law Comm. Br. 6 n.6. As these examples reflect, anti-discrimination statutes are not regarded as laws addressing "predominantly local activities, such as industrial and labor relations" (Rule of Law Comm. Br. 10 (quoting Restatement (Third) of the Foreign Relations Law of the United States § 414, comment c, at 271 (1986) [hereinafter *Third Restatement*]); Resp. Br. 25.

The Department of Labor has exercised authority conferred by Exec. Order No. 11,246, § 204, 3 C.F.R. 342 (1964-1965 comp.) to exempt "work performed outside the United States" from anti-discrimination regulations applicable to government contracts, but only when "no recruitment of workers within the limits of the United States is involved." 41 C.F.R. 60-1.5(a)(3). Compare Soc. Hum. Res. Mgt. Br. 21 (omitting all mention of the limitation).

call attention to some countries' resistance to applications of American antitrust law and other economic regulation (Resp. Br. 25 n.19; Rule of Law Comm. Br. 18 n.16), they cite not a single instance in which the ADEA or other anti-discrimination statutes that apply abroad (see note 13, *supra*) have been regarded as a violation of international law.

b. Respondents and certain *amici* suggest that in the area of employment discrimination, jurisdiction to prescribe law for a state's nationals has been circumscribed by a practice of restricting anti-discrimination laws to the territorial limits of the prescribing state or by international agreements. The fact that some nations have chosen not to prohibit their nationals from discriminating against one another beyond their borders falls far short of what is required to establish a rule of international law: "a general and consistent practice of states followed by them *from a sense of legal obligation.*" *Third Restatement* § 102(2) & comment c (emphasis added).[14]

On their face, the international agreements on which respondents and their *amici* rely do not purport to withdraw prescriptive jurisdiction that the signatories enjoy under the nationality principle. Compare Resp. Br. 40;

[14] Indeed, by indicating dissent while a rule remains in the process of formulation, a state avoids being bound even after the rule matures. *Third Restatement* § 102, comment d. In view of the ADEA and other American laws, there can be no claim that the United States has recognized such a rule of international law.

Rule of Law Comm. Br. 15. Nor does the agreements' purpose permit such a strained construction; agreements committing nations to the goal of eliminating employment discrimination throughout the world should not be read to withdraw authority those states otherwise enjoy to prescribe law for their own nationals advancing that very goal.

c. The diplomatic notes appended to respondents' brief do not suggest that it would violate international law to apply Title VII to discrimination abroad by American employers against American citizens. See Resp. Br. App. 6a-10a. Rather, the notes urge that, *if* this Court construes Title VII to extend to discrimination by American employers against American citizens, a question on which the notes express no opinion, the statute should be applied in a manner consistent with international law, with due regard for principles of comity and sovereignty. Those understandable concerns lend no support to foreclosing Title VII's extraterritorial application to U.S. citizens.

d. Respondents and their *amici* suggest that "sensitive and sometimes vast cultural differences between this nation and other sovereign states" (Resp. Br. 40), "potentially conflicting standards" (EEAC Br. 18), and discrimination statutes of other nations (Resp. Br. 40) should be held to foreclose Title VII's application abroad. In view of the emerging international consensus against discrimination, it would be wrong to assume that Title VII is so fundamentally out of step with employment practices around the world that Congress could not have intended it to apply at all outside the United States. Moreover, Title VII represents a determined effort to protect Americans from employment discrimination based upon cultural biases and stereotypes, even those that intrude upon international business operations. See *Fernandez* v. *Wynn Oil Co.*, 653 F.2d 1273 (9th Cir. 1981). Title VII is fairly construed to prohibit American employers from incorporating those biases into their dealings with American employees.

Similarly, the fact that foreign states have enacted legislation directed to employment does not, in and of itself, weigh against application of Title VII to American nationals abroad. International law acknowledges that more than one nation may exercise prescriptive jurisdiction over a given subject matter. Here again, since most nations share a common view of employment discrimination, conflicts between such laws will likely be rare.

There is no apparent conflict, for instance, between Title VII's application to this case and the Labor and Workmen Law of Saudi Arabia. Respondents stop well short of asserting such a conflict. They say only that this statute regulates all employment in Saudi Arabia; that it "contains numerous substantive provisions"; that it establishes a "a procedural framework consisting of two judicial commissions"; and that these commissions draw no distinction between citizens of Saudi Arabia and foreign nationals. Resp. Br. 41; see also *id.* at 3. Even assuming the accuracy of these characterizations, there could hardly be any contention that Saudi law compelled the discrimination alleged by petitioner Boureslan, or that application of Title VII to this case would contradict any aspect of the Kingdom's law. There is no indication that this case presents anything beyond the exercise of concurrent jurisdiction. The mere possibility of some conflicts between Title VII and foreign law is no reason to preclude any application of Title VII abroad; rather, any conflicts that do arise may be resolved within the framework of Title VII. See EEOC Br. 27 & nn.23-24.

3. Respondents argue that the EEOC has not been consistent in its interpretation of Title VII with respect to the question presented. They contend that an interpretative regulation promulgated by the Commission in 1970 limited Title VII to employment within the United States (Resp. Br. 44) and that the interpretation conveyed by the EEOC's General Counsel to the Senate Foreign Relations Committee in 1975 "was in conflict with the agency's regulation then in force" (Resp. Br. 44).

Respondents have misread the EEOC's prior regulation. The quoted provision was part of a regulation ad-

dressing national origin discrimination—which focused on discrimination in this country against persons born abroad. To make clear that aliens in this country were entitled to protection against that form of discrimination, the regulation stated that the statute protects "all individuals, both citizens and noncitizens, domiciled or residing in the United States." J.A. 46. By underscoring that *all* individuals were protected in the United States, the regulation did not suggest that *Americans* were protected only when they are present in this country. There is no reason to suppose that the Commission's General Counsel responded to Congress's inquiries regarding Title VII's scope with an unauthorized interpretation of the statute.[15]

* * * * *

For the foregoing reasons and those set forth in our initial brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

JANUARY 1991

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[15] See *Robertson* v. *Methow Valley Citizens Council*, 109 S. Ct. 1835, 1850 (1989); *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945); *Udall* v. *Tallman*, 380 U.S. 1, 16-17 (1965); *INS* v. *Stanisic*, 395 U.S. 62, 72 (1969); *Ford Motor Credit Co.*, v. *Milhollin*, 444 U.S. 555, 556 (1980).

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Petitioner,

v.

ARABIAN AMERICAN OIL CO.,
Respondent.

ALI BOURESLAN,
Petitioner,

v.

ARABIAN AMERICAN OIL CO.,
Respondent.

On Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF AMICI CURIAE OF THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., THE AMERICAN JEWISH COMMITTEE, THE AMERICAN JEWISH CONGRESS, THE ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH, AND THE WOMEN'S LEGAL DEFENSE FUND IN SUPPORT OF PETITIONERS

PAMELA S. KARLAN
University of Virginia
School of Law
Charlottesville, VA 22901
(804) 924-7810

JULIUS LEVONNE CHAMBERS
*CHARLES STEPHEN RALSTON
The NAACP Legal Defense
and Educational Fund, Inc.
99 Hudson Street, 16th Floor
New York, N.Y. 10013
(212) 219-1900

[Additional Counsel Listed on Inside Front Cover]

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

AMY ADELSON
LOIS WALDMAN
MARC D. STERN
American Jewish Congress
15 East 84th Street
New York, N.Y. 10028
(212) 879-4000

SAMUEL RABINOVE
The American Jewish Committee
165 E. 56th Street
New York, N.Y. 10022
(212) 751-4000

RUTH L. LANSNER
STEVEN M. FREEMAN
JILL L. KAHN
The Anti-Defamation League of B'nai B'rith
823 United Nations Plaza
New York, N.Y. 10017
(212) 490-2525

DONNA R. LENHOFF
Women's Legal Defense Fund
2000 P Street, N.w.
Suite 400
Washington, D.C. 20036
(202) 887-0364

*Counsel of Record

Attorneys for Amici Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF AMICI CURIAE 2

SUMMARY OF ARGUMENT 7

ARGUMENT 9

INTRODUCTION 9

I. TITLE VII WAS ENACTED AGAINST THE BACKDROP OF CONGRESS' LONG-STANDING CONCERN WITH ENSURING EQUAL EMPLOYMENT OPPORTUNITIES IN INTERNATIONAL COMMERCE FOR AMERICAN CITIZENS 12

II. ONE OF THE PURPOSES OF THE CIVIL RIGHTS ACT OF 1964 WAS TO PROMOTE NONDISCRIMINATION ABROAD 25

III. SECTION 702 SHOULD BE CONSTRUED TO GIVE TITLE VII EXTRATERRITORIAL APPLICATION IN LIGHT OF CONGRESS' CLEARLY EXPRESSED CONCERN WITH FAIR EMPLOYMENT OVERSEAS 31

IV. SUBSEQUENT LEGISLATION ALSO DEMONSTRATES CONGRESS' INTENTION TO PROVIDE EQUAL EMPLOYMENT OPPORTUNITY FOR AMERICAN CITIZENS IN THE INTERNATIONAL WORKPLACE 36

CONCLUSION 41

TABLE OF AUTHORITIES

Cases: *Pages:*

Abrams v. Baylor College of Medicine, 805 F.2d 528 (5th Cir. 1986) 18, 39

Alfred Dunhill of London v. Republic of Cuba, 425 U.S. 682 (1976) 11

American Jewish Congress v. Arabian American Oil Co., No. C-4296-56 (N.Y. State Comm'n Against Discrimination Jan. 26, 1959) 22

American Jewish Congress v. Carter, 190 N.Y.S.2d 218, 221 (Sup. Ct. 1959), *modified*, 10 A.D.2d 833, 199 N.Y.S.2d 157 (App. Div. 1960), *aff'd*, 9 N.Y.2d 227, 213 N.Y.S.2d 60 (1961) 4, 10, 23, 24

Boureslan v. American Arabian Oil Co, 653 F. Supp. 629, 629 (S.D. Tex. 1987), *aff'd* 857 F.2d 1014, 1016 (5th Cir. 1988), *vacated for rehearing en banc and aff'd*, 892 F.2d 1271 (5th Cir. 1990) (*en banc*) 18, 31

Diaz v. Pan American World Airways, 454 F.2d 234 (5th Cir.), *cert. denied*, 404 U.S. 950 (1971) 39

Espinoza v. Farah Manufacturing Co., 414 U.S. 86 (1973) 33

Franks v. Bowman Transp. Co., 424 U.S. 747 (1976) 11

Griggs v. Duke Power Co., 401 U.S. 424 (1971) 2

Pages:

Hardin v. City Title & Escrow Co., 797 F.2d 1037 (D.C. Cir. 1986) 32

House v. Commissioner, 453 F.2d 982 (5th Cir. 1972) 32

International Ass'n of Machinists v. OPEC, 649 F.2d 1354, 1358-61 (9th Cir. 1981) (same), *cert. denied*, 454 U.S. 1163 (1982) 11

NAACP v. Button, 371 U.S. 415 (1963) 2

Newman v. Piggie Park Enterprises, 390 U.S. 400 (1968) 1

Regents v. Bakke, 438 U.S. 265 (1978) 25

United Steelworkers v. Weber, 443 U.S. 103 (1979) . 13

Statutes and Resolutions:

29 U.S.C. § 213(f) 19

42 U.S.C. § 1981 34

50 U.S.C. App. § 2402(5)(A) 36

50 U.S.C. App. § 2407(a) 37, 38

Civil Rights Act of 1964, § 701, 42 U.S.C. § 2000e . 33

Civil Rights Act of 1964, § 702, 42 U.S.C. § 2000e-1 . . . . . 31, 32, 34

Civil Rights Act of 1964, § 703, 42 U.S.C. § 2000e-2. 33

Pages:

S. Res. 323, 84th Cong., 2d Sess. (1956) 14-16, 22

Legislative History:

102 CONG. REC. 14330 (July 25, 1956) 15

102 CONG. REC. 14732 (July 26, 1956) 16

102 CONG. REC. 14733 (July 26, 1956) 17

Civil Rights-Public Accommodations: Hearings on S. 1732 Before the Sen. Comm. on Commerce, 88th Cong., 1st Sess. (1963) 26-30

H.R. Rep. No. 190, 95th Cong., 1st Sess. (1977) 37, 40

S. Rep. No. 872, 88th Cong. 2d Sess. (1964) 22

S. Rep. No. 2790, 84th Cong., 2d Sess. (1956) 15

Other Materials:

M. BORDEN, JEWS, TURKS, AND INFIDELS (1984). . . . 14

Dudziak, *Desegregation as a Cold War Imperative*, 41 *Stan. L. Rev.* 61 (1988). 26

Gold, *Griggs' Folly: An Essay on the Theory, Problems, and Origins of the Adverse Impact Definition of Employment Discrimination and a Recommendation for Reform*, 7 INDUST. REL. L.J. 429 (1985). 10

Pages:

Letter from Secretary of State John Foster Dulles to Philip Klutznick, President of B'nai B'rith (Aug. 14, 1956) . . 23

Letter from Assistant Secretary of State William B. Macomber, Jr. to Sen. E.L. Bartlett (July 29, 1959) . . 24

Note, *Title VII and the Arab Boycott*, 12 HARV. C.R.-C.L. L. REV. 181 (1977). 36

Street, *Application of U.S. Fair Employment Laws to Transnational Employers in the United States and Abroad*, 19 N.Y.U.J. INT'L L. & POL. 357 (1987). 18

No. 89-1838
No. 89-1845

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Petitioner,

v.

ARABIAN AMERICAN OIL CO.,
Respondent.

ALI BOURESLAN,
Petitioner,

v.

ARABIAN AMERICAN OIL CO.,
Respondent.

On Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF AMICI CURIAE OF THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., THE AMERICAN JEWISH COMMITTEE, THE AMERICAN JEWISH CONGRESS, THE ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH, AND THE WOMEN'S LEGAL DEFENSE FUND IN SUPPORT OF PETITIONERS

INTEREST OF AMICI CURIAE[1]

The NAACP Legal Defense and Educational Fund, Inc., is a non-profit corporation that was established for the purpose of assisting black citizens in securing their constitutional and civil rights. This Court has noted the Fund's "reputation for expertness in presenting and arguing the difficult questions of law that frequently arise in civil rights litigation." *NAACP v. Button*, 371 U.S. 415, 422 (1963).

A significant portion of the Fund's litigation has concerned Title VII of the Civil Rights Act of 1964 and the proper scope of constitutional and statutory rights to equal employment opportunity. *See, e.g., Griggs v. Duke Power Co.*, 401 U.S. 424 (1971); *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975). The Fund has long been committed to the proposition that full equality of economic opportunity requires applying prohibitions on discrimination in employ-

[1]Letters of consent to the filing of this Brief have been filed with the Clerk of Court.

ment to American corporations regardless of where such discrimination occurs.

The American Jewish Committee ("AJC") is a national membership organization, founded in 1906 to protect the civil and religious rights of Jews. AJC has always believed that these rights can be secure for Jews only if they are equally secure for Americans of all faiths, races, and ethnic backgrounds. AJC, therefore, has been actively involved in the civil rights cause since its inception in the 1930s, and strongly supported enactment of the Civil Rights Act of 1964. This organization has always urged that civil rights laws be interpreted broadly to effectuate their purposes. That is why AJC believes that Title VII should be interpreted to apply to discrimination outside the United States by an American corporation against an American citizen employee.

The American Jewish Congress is a national membership organization founded in 1918 for the

preservation of the security and the constitutional and civil rights of Jews in America through guaranteeing the rights of all Americans. Since 1959 when as a plaintiff in *American Jewish Congress v. Carter*, 190 N.Y.S.2d 218, 221 (Sup. Ct. 1959), *modified*, 10 A.D.2d 833, 199 N.Y.S.2d 157 (App. Div. 1960), *aff'd*, 9 N.Y.2d 227, 213 N.Y.S.2d 60 (1961), it successfully litigated under New York anti-discrimination law to ban Aramco's discriminatory employment practices from New York State, the American Jewish Congress has fought to assure equality of employment opportunity for Americans both at home and abroad. It has brought and successfully settled cases involving fact patterns identical to those in the instant case. It believes reversal of the decision below is necessary to preserve the continued vitality of Title VII as a means to prevent and remedy discrimination in employment against Americans in the international work place.

The Anti-Defamation League of B'nai B'rith (ADL) was organized in 1913 to advance good will and mutual understanding among Americans of all races a creeds, and specifically to combat racial and religious discrimination both in the United States and abroad. Among the many activities directed towards these goals, in 1977 ADL fought successfully for the passage of the antiboycott provisions of the Export Administration Act (EAA), which prohibit U.S. companies from discriminating against U.S. citizens in order comply with the Arab boycott of Israel and Israeli interests. Subsequently, ADL filed *amicus* briefs in cases involving a private right of action under the EAA, including *Abrams v. Baylor College of Medicine*, 805 F.2d 528 (5th Cir. 1986), and *Bulk Oil (Zug) A.G. v. Sun Company, Inc.*, 583 F. Supp. 1134 (S.D.N.Y. 1983), *aff'd*. 742 F.2d 1431 (2d Cir.), *cert. denied*, 469 U.S. 835 (1984). Moreover, ADL has a consistent record of fighting employment discrimination in a variety of domestic contexts, and has

filed *amicus* briefs in cases such as *Hobbie v. Unemployment Appeals Commission*, 480 U.S. 136 (1987) (holiday observance); *Hishon v. King & Spaulding*, 467 U.S. 69 (1984)(sex discrimination); and *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273 (1976)(racial discrimination).

ADL submits the accompanying brief because we believe this Court will decide the important issue of whether an American who is the target of employment discrimination by a U.S. company doing business abroad should be afforded the same legal protection as one who is subject to employment discrimination by a U.S. company doing business in this country. ADL has a vital interest in ensuring that Americans are protected from employment discrimination both at home and abroad, and we therefore support the extraterritorial application of Title VII of the Civil Rights Act of 1964 with regard to Americans employed by American companies.

The Women's Legal Defense Fund is a non-profit, tax-exempt membership organization, founded in 1971 to provide *pro bono* legal assistance to victims of discrimination based on sex. The Fund devotes a major portion of its resources to combatting sex discrimination in employment, through litigation of significant employment discrimination cases, operation of an employment discrimination counseling program, public education, and advocacy before the EEOC and other federal agencies that are charged with enforcement of equal employment laws.

SUMMARY OF ARGUMENT

I.

As early as 1956, Congress made clear its concern with ensuring equal employment opportunities for American citizens working abroad for American corporations. In particular, the Senate passed a resolution stating that it was against national policy for there to be distinctions based on

religion in the negotiations of trade agreements between the United States and foreign nations. This historical background must be considered in interpreting Title VII of the Civil Rights Act of 1964.

II.

A specific purpose of the Civil Rights Act of 1964 was to promote nondiscrimination abroad. The ending of racial discrimination within the United States was considered key to enhancing America's image and to affect discrimination in other countries by setting a standard for the world.

III.

The language of Title VII supports the conclusion that it applies to the employment practices of American companies operating abroad. The Fifth Circuit's construction of the statute is artificially narrow and inconsistent with the terms of the statute.

IV.

In subsequent legislation, Congress has demonstrated its intention to provide equal employment opportunity for American citizens working abroad. The Export Administration Act expressly covers discrimination against Americans by American corporations operating abroad. It would be wholly inconsistent with Congress' intent to give Title VII a more limited scope.

ARGUMENT

INTRODUCTION

This is not the first time that respondent Arabian American Oil Co. ("Aramco") has sought to insulate its treatment of American citizens from scrutiny under equal employment opportunity laws by pointing to the international nature of its business. Thirty years ago, Aramco argued that its refusal to hire Jews should be immune from the reach of a state antidiscrimination statute that served as one of the

models for Title VII[2] because Jews were not permitted entry into Saudi Arabia and because the Saudi government, on whose good will Aramco was economically dependent, disapproved of Aramco's employing Jews anywhere. *See American Jewish Congress v. Carter*, 190 N.Y.S.2d 218, 221 (Sup. Ct. 1959), *modified*, 10 A.D.2d 833, 199 N.Y.S.2d 157 (App. Div. 1960), *aff'd*, 9 N.Y.2d 227, 213 N.Y.S.2d 60 (1961) (rejecting Aramco's position).

The argument accepted by the Fifth Circuit in this case represents a significant expansion of this already-discredited position, for the Fifth Circuit's opinion gives American companies a blanket license to discriminate in their overseas operations as they see fit, regardless of the laws or customs of other counties. The Fifth Circuit did not find that Aramco's discriminatory conduct is somehow *required* by a foreign government. Thus, this case does not raise

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[2] *See generally* Gold, *Griggs' Folly: An Essay on the Theory, Problems, and Origins of the Adverse Impact Definition of Employment Discrimination and a Recommendation for Reform*, 7 INDUST. REL. L.J. 429, 568-73 (1985).

potentially troublesome issues concerning the act of state and foreign compulsion doctrines. *Cf., e.g., Alfred Dunhill of London v. Republic of Cuba*, 425 U.S. 682, 705 n. 18 (1976) (plurality opinion) (discussing doctrines); *International Ass'n of Machinists v. OPEC*, 649 F.2d 1354, 1358-61 (9th Cir. 1981) (same), *cert. denied*, 454 U.S. 1163 (1982). Rather, the Fifth Circuit excused an American corporation from complying with a statute expressing our Nation's "highest priority," *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 763 (1976) (quoting *Newman v. Piggie Park Enterprises*, 390 U.S. 400, 402 (1968)), because it assumed that Congress failed to express an intention that Title VII apply extraterritorially. *See Boureslan v. Aramco*, 892 F.2d 1271, 1273-74 (5th Cir. 1990) (*en banc*).

That assumption is critically flawed. It reflects an improperly cramped view of the available evidence regarding Congress' concern with the overseas employment opportunities of American citizens and the overseas em-

ployment practices of American corporations. That evidence clearly shows that Congress has long been concerned with ensuring equal employment opportunities for American citizens in international commerce. In light of that evidence and relevant principles of statutory construction, § 702 provides additional evidence that Title VII should be given extraterritorial effect with regard to American citizens employed by American companies.[3]

I. TITLE VII WAS ENACTED AGAINST THE BACKDROP OF CONGRESS' LONG-STANDING CONCERN WITH ENSURING EQUAL EMPLOYMENT OPPORTUNITIES IN INTERNATIONAL COMMERCE FOR AMERICAN CITIZENS

The Civil Rights Act of 1964 was not passed in a vacuum. To understand the scope Congress intended the Act to have, one must examine Congress' prior treatment of the

[3] Judge King's persuasive dissent and the arguments advanced by the Equal Employment Opportunity Commission and the private petitioner address in detail the general principles of statutory construction that should govern this case and much of the relevant evidence in the legislative history of Title VII. We do not repeat their analyses in this brief.

question of discrimination abroad by American companies against American citizens. *Cf. United Steelworkers v. Weber*, 443 U.S. 103, 201 (1979) (Title VII must be construed in "the historical context from which the Act arose"). Examination of this issue strongly supports extraterritorial application of Title VII, for, prior to the passage of Title VII, Congress had expressed a forceful commitment to eliminating employment discrimination abroad against American citizens.

There are two distinct contexts in which employment discrimination against Americans overseas might occur: (1) the discrimination might be required by the laws of a foreign government or (2) the foreign government might be neutral as to the permissibility of such discrimination. Obviously, the former situation presents a stronger argument for confining American fair employment laws within United States borders, since it involves a square conflict of laws and sovereignty. Even in this more potentially troublesome

context, however, Congress has repeatedly manifest its desire to extend principles of nondiscrimination in employment as far as possible. Senate Resolution 323, 84th Cong., 2d Sess. (1956), represents an express statement of this congressional commitment to extraterritorial equal employment opportunity.

During the 1950's, Congress became increasingly concerned with the refusal of American corporations doing business with the Arab world to hire American Jews.[4] In 1956, the Senate unanimously passed a resolution condemning discrimination in overseas employment on the basis of religion:

> Whereas the protection of the integrity of United States citizenship and of the proper rights of United States citizens in their pursuit of lawful trade, travel, and other activities abroad is a principle of United States sovereignty; and
>
> Whereas it is a primary principle of our Nation that there shall be no distinction among United States citizens based on their individual religious affiliations and since any attempt by foreign nations to create such distinctions among our citizens in the granting of personal or commercial access or any other rights otherwise available to United States citizens generally is inconsistent with our principles; Now, therefore, be it
>
> *Resolved*, That it is the sense of the Senate that it regards any such distinctions directed against United States citizens as incompatible with the relations that should exist among friendly nations, and that in all negotiations between the United States and any foreign state every reasonable effort should be made to maintain this principle.

S. Res. 323, 84th Cong. 2d Sess. (1956) (*quoted in* 102 CONG. REC. 14330 (July 25, 1956)).

The discussion on the floor of Senate Resolution 323 further illustrates Congress' desire to assure that American citizens abroad enjoy, to the maximum extent possible, the same equal employment opportunity they enjoy within the United States.[5] Senator Lehman (D.-N Y.), the primary

[4] This was not, however, the first time Congress had expressed this concern. As early as the 1850's, Congress had passed resolutions urging other nations not to discriminate among American citizens on the basis of religion, and had refused to accept foreign commerce treaties that did not provide for nondiscrimination among American citizens. *See* M. BORDEN, JEWS, TURKS, AND INFIDELS 82-88, 94-96 (1984).

[5] The Committee on Foreign Relations recommended passage of the resolution without objection. The committee report that accompanied the resolution, S. REP. No. 2790, 84th Cong., 2d Sess. (1956), stated succinctly that "[t]he resolution speaks for itself."

sponsor of S. Res. 323,[6] stated that the purpose of the resolution was to prevent foreign employment practices, even those compelled by foreign governments, from making "second-class citizens of some . . . Americans . . . ." 102 CONG. REC. 14732 (July 26, 1956).[7] He explained that the resolution should govern the negotiation of trade agreements to make sure that such agreements

> expressly provide that no United States citizen shall, solely because of religious affiliation or derivation, be denied the *advantages of . . . employment* . . . or any other benefit made possible by such treaty, convention or agreement.

Id. (Emphasis added.)

Two of Senator Lehman's remarks are particularly salient to the issue now before this Court. First, Senator

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[6] Sen. Lehman received unanimous consent to put his testimony in the record "to supplement the language of the resolution itself." 102 CONG. REC. 14732 (July 26, 1956).

[7] Several senators who spoke in favor of the resolution stated that the integrity of United States sovereignty and citizenship would be compromised if Americans overseas were subject to discrimination in employment on the basis of religion. *See, e.g., id.* at 14731 (July 26, 1956) (statement of Sen. Morse); *id.* at 14733 (statement of Sen. Neuberger); *id.* (statement of Sen. Humphrey).

Lehman expressly linked the application of principles of non-discrimination to foreigners within the United States to the United States' right to insist that American citizens be treated fairly abroad. *Id.* at 14733; *see also id.* (statement of Sen. Morse) (resolution "will demonstrate once again -- and it is time we made it clear -- that a basic idea of America, not only in foreign relations, but in domestic policy, is that there can be no question raised as to the rights of our citizens based upon religious faith.").

Second, Senator Lehman recognized the potential *domestic* effect of sanctioning discrimination abroad. *Id.* In order to assure nondiscrimination at home by transnational employers it would be necessary to press for nondiscrimination abroad.

The phenomenon identified by Senator Lehman--the interdependence of the domestic and international employment markets--is especially important in understanding how the Fifth Circuit's interpretation threatens

to undermine Congress' intentions in enacting Title VII. Title VII was intended to expand the employment opportunities available to racial, ethnic, and religious minorities and to women. In today's multinational economy,[8] an individual's advancement within a corporation may often be dependent on training, experience, and contacts that occur abroad. *See, e.g., Abrams v. Baylor College of Medicine*, 805 F.2d 528, 530 (5th Cir. 1986) (higher incidence of certain heart diseases in Saudi Arabia meant that cardiologists who spent time in program run by Baylor there received "a greater opportunity for clinical experience . . . than is generally available in America"). Moreover, many decisions regarding positions abroad are in fact made in the United States. *See, e.g., Boureslan v. American Arabian Oil Co*, 653 F. Supp. 629, 629 (S.D. Tex. 1987), *aff'd* 857 F.2d 1014, 1016 (5th Cir. 1988), *vacated for*

[8] *See, e.g.*, Street, *Application of U.S. Fair Employment Laws to Transnational Employers in the United States and Abroad*, 19 N.Y.U.J. INT'L L. & POL. 357, 358 (1987) (2000 U.S. firms operate 21,000 foreign subsidiaries in 121 countries).

rehearing en banc and aff'd, 892 F.2d 1271 (5th Cir. 1990) (*en banc*) (Boureslan requested and was given a transfer to Aramco and its Saudi operations while he was working at ASC in Houston, Texas). If racial, religious, and ethnic minorities or women lose their right to fair treatment whenever they spend time working for their American employer's overseas operations, they face a Hobson's choice. If they choose not to take jobs that require working abroad[9] in order to remain under Title VII's protection, they will be less competitive in seeking jobs *within the United States* because they will lack the experience and contacts that persons who have taken such jobs obtain. If, on the other hand, they take overseas positions, they may be discriminat-

[9] This may even preclude accepting assignments that require protracted overseas travel. The stringent territorial restriction of Title VII required by the panel's interpretation might mean, for example, that sexual harassment of a female employee on a two-week business trip to Asia would be beyond the reach of Title VII even though both the supervisor and the victimized subordinate are American citizens employed by an American corporation in an American office. *Cf.* 29 U.S.C. § 213(f) (Fair Labor Standards Act does not apply to "any employee whose services during the work week are performed in a workplace within a foreign country").

ed against as soon as they arrive on foreign soil. If they are fired, or harassed into quitting, by discrimination that would be forbidden if it occurred within the United States, the termination of their relationship with the American-based employer will preclude their later moving up the corporate ladder into domestic positions.

Moreover, if a substantial number of potential employees refuse to work overseas because to do so would strip them of fundamental protections, employers may have to pay a premium to induce potential employees to work abroad. White Anglo-Saxon male workers will benefit disproportionately from such a premium, since they will be less likely to be at risk of discrimination. Ultimately they will receive both a direct premium -- from accepting overseas assignments -- and an indirect competitive advantage against their minority or female competitors who have not received the training or experience acquired from overseas employment.

Finally, the Fifth Circuit's approach creates a massive loophole for companies that wish to circumvent Title VII. In essence, it permits employers to "launder" their discrimination just as offshore banks permit criminals to "launder" illegally acquired funds. For example, a company that wants to fire a female employee need only transfer her to an overseas office. It can then terminate her without facing Title VII liability. Even the threat of being sent overseas, when coupled with the likely prospect of harassment or discharge without redress under Title VII may cause an employee's resignation or acquiescence in discriminatory treatment. For example, a company that wishes to exclude women from certain positions *in its United States operations* may be able to induce female employees to refrain from seeking the positions by requiring all employees seeking the position to serve overseas and by doing nothing

to discourage sexual harassment in its operations abroad.[10]

S. Res. 323 reflected a broad consensus within the legislative and executive branches regarding equal employment opportunities in international commerce.[11]

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[10] The Fifth Circuit's opinion poses another potential threat to employment opportunities within the United States. To the extent that American companies believe they can reduce costs by exporting American jobs overseas, they will do so. The effect will be to diminish the number of available domestic jobs. To the extent that a corporation views compliance with principles of fair employment as a cost, releasing the company from compliance with those principles creates an incentive for the company to move those jobs offshore even when it continues to fill the jobs with American citizens. The net result is either that it will then not hire protected groups to fill the jobs or that it will not give those groups the protection they would enjoy in domestic employment situations. In either event, those groups' employment opportunities will be diminished. In short, the Fifth Circuit has created an incentive for American companies to export American jobs.

[11] The 1956 platforms of both political parties expressed similar sentiments. The Democratic platform stated that "We oppose, as contrary to American principles, the practice of any government which discriminates against American citizens on grounds of race and religion. We will not countenance any arrangement or treaty with any government which by its terms or in its practical application would sanction such practices." The Republican platform stated that "We approve appropriate action to oppose the imposition by foreign government of discrimination against United States citizens based on their religion or race." *Quoted in American Jewish Congress v. Arabian American Oil Co.*, No. C-4296-56 (N.Y. State Comm'n Against Discrimination Jan. 26, 1959). *Cf.* S. REP. No. 872, 88th Cong. 2d Sess. (1964), *reprinted in* 1964 U.S. CONG. CODE & AD. NEWS 2355, 2362-63 (Senate report accompanying Civil Rights Act of 1964 quotes 1960 platforms of Democratic and Republican parties to show national commitment to "equal opportunity and elimination of racial discrimination").

Secretary of State John Foster Dulles responded to questions about the opportunities of American Jews to work abroad by writing that "[i]t is the policy of the Department of State not to acquiesce in any discriminatory practices, but to point out to the leaders of the Arab states the equality of all Americans irrespective of race or creed under the Constitution and laws." Letter from Secretary of State John Foster Dulles to Philip Klutznick, President of B'nai B'rith (Aug. 14, 1956), *quoted in American Jewish Congress v. Arabian American Oil Co.*, No. C-4296-56 at 6-7 (N.Y. State Comm'n Against Discrimination Jan. 26, 1959).[12] The Department reiterated this position in a 1959 letter written to Senator E.L. Bartlett regarding the then-pending *American Jewish Congress v. Carter* litigation:

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[12] The letter continues: "We in the Department of State are particularly anxious to do what we can to insure that United States citizens in pursuit of legitimate trade, travel and other activities abroad will not face distinctions of the kind of which you write. Our posts in countries where discriminatory practices are followed have also been instructed to point out the strong feelings of the American public and of the Congress in this matter." *Id.* at 7.

> [T]he proper policy of our Government must be to work for the elimination of any procedures adopted by foreign states which tend to discriminate against our citizens in any way, including discrimination on the basis of race or religion.

Letter from Assistant Secretary of State William B. Macomber, Jr. to Sen. E.L. Bartlett (July 29, 1959), *quoted in* Brief of Petitioner-Respondent at 64, *American Jewish Congress v. Carter*, 199 N.Y.S.2d 158 (App. Div. 1960).

In sum, the enactment of Title VII must be viewed against the backdrop of the Senate's desire that Americans abroad be protected by the right to equal treatment they enjoyed at home. The discussion surrounding the unanimous passage of Resolution 323 and widespread concern with overseas employment opportunities for American religious minorities in the decade preceding the passage of Title VII strongly suggest that when Congress expanded federal protection of employment rights in 1964, it intended that the new protections, like their predecessors, extend to Americans overseas.

II. One of the Purposes of the Civil Rights Act of 1964 Was To Promote Nondiscrimination Abroad

The Civil Rights Act of 1964 represented a comprehensive attack on the problems of prejudice in public accommodations, employment, access to governmental services, and voting. Thus, the legislative history of the various titles can contribute to an understanding of the proper scope to be afforded particular provisions. *Cf. e.g.*, *Regents v. Bakke*, 438 U.S. 265, 353 (1978) (opinion of Brennan, White, Marshall, & Blackmun, JJ.) (interpreting Titles VI and VII in tandem).

The testimony presented in support of the public accommodations provisions of the Act by Secretary of State Dean Rusk demonstrates the Administration's intention that the enactment of antidiscrimination legislation in the United States serve to expand protections against discrimination abroad.

The fact that racial discrimination within the United States had injured America's image and impaired the conduct of its foreign relations had long been recognized. *See generally* Dudziak, *Desegregation as a Cold War Imperative*, 41 STAN. L. REV. 61 (1988) (discussing foreign reactions to racial discrimination in employment, education, and public accommodations, and federal government's response to these reactions). But Secretary Rusk went beyond seeking a public accommodations law to eliminate damaging episodes of racial discrimination against foreign diplomats traveling in America. *See, e.g., id.* at 90-92; *Civil Rights-Public Accommodations: Hearings on S. 1732 Before the Sen. Comm. on Commerce*, 88th Cong., 1st Sess. 283-87 (1963) (statement of Secretary Rusk). He argued instead that the foreign affairs implications of such a law extended to its potential effect on discrimination *in other countries*. For example, he suggested that the United States' treatment of foreigners should "se[t] a standard for all the world." *Id.* at

283. In addition, he echoed the theme of interdependence identified above:

> For example, the Department of State has a duty to assist and protect American citizens traveling abroad--and without regard to race, religion, or national origin of the particular American citizen.
>
> Now, against a background of, shall I say, disability in our own country on some of these same issues, our voice abroad, in seeking to protect American citizens abroad, is somewhat muted and uncertain. And I think this affects the elements of reciprocity under the conduct of our foreign relations as well as the broader issues in what might be called the propaganda and political field.

Id. at 290. Thus, Secretary Rusk both identified the United State's pre-existing commitment to assuring equal protection for American citizens overseas and recognized the effect domestic treatment might have on the conduct of foreign affairs. The latter point further highlights the propriety of giving Title VII extraterritorial effect: foreigners' closest exposure to American principles of nondiscrimination is likely to come when those principles are demonstrated to

them in their own country.[13]

In addition, Secretary Rusk explicitly made the point that American laws might affect laws overseas. Senator Thurmond referred to Secretary Rusk's statement that racial discrimination was not unique to the United States but occurred in many countries, and asked the Secretary in light of that fact and the proposed Title VI (which denies federal funds to institutions that discriminate) whether foreign aid should be denied to other nations that discriminated. The Secretary recognized that "[w]hen we are dealing with the rest of the world we are dealing with a world which we can influence, but cannot control," and thus that cutting off aid might be a counterproductive strategy for influencing other nations. But he went on to state that:

> In the rest of the world we are waging a struggle for freedom. . . . We must stay with that struggle, use our influence to the best of our ability to sustain and strengthen the cause of freedom; and

[13] Thus, for example, American principles of racial equality were powerfully demonstrated by the appointment of a black ambassador to South Africa.

> that would mean we would work at it, use our influence, even though we can't necessarily control the result.
>
> Our influence in these situations can be very strong. I think there are differences between situations where governmental laws and constitutional practices are responsible for the discrimination, and where you run into discriminatory situations simply because of the existence of religious and racial groups next to each other, with the social problems that have historically been associated with those situations.
>
> *Our influence has been in the direction o[f] removing these discriminations abroad as well as at home.*
>
> I think our advice in this respect would be more powerful if we could move forward at home more rapidly.
>
> . . . I do not think we should abandon the great struggle for freedom throughout the world . . . .

Id. at 299. (Emphasis added.)

In light of Secretary Rusk's testimony, the committee chairman, Senator Warren Magnuson stated that discrimination abroad should not lead the United States to "abandon our purpose to show the world the kind of leadership that would erase discrimination in the world." *Id.* at 306. He concluded:

> Our positive action toward a firm national policy on this is going to be very helpful to the people in other countries who want to abolish this sort of thing *in their countries*.

Id. (emphasis added).

Congress chose to give extraterritorial effect to Title VII because to do so clearly would serve the central foreign policy goals connected with the Civil Rights Act of 1964. By providing an illustration of the scope of American fair employment law within foreign territories, it would graphically demonstrate the level of American commitment to ideals of nondiscrimination. Moreover, it would also provide an incentive for foreign citizens to press their governments to institute similar guarantees.

III. Section 702 Should Be Construed To Give Title VII Extraterritorial Application In Light of Congress' Clearly Expressed Concern With Fair Employment Overseas

The Fifth Circuit rejected the argument that section 702, 42 U.S.C. § 2000e-1, indicates Congress' intention to give Title VII extraterritorial effect. It held instead that section 702 was intended to ensure the extension of Title VII's protection to aliens working within the United States. *See Boureslan*, 892 F.2d at 1274. This artificially narrow interpretation substantially distorts the statutory framework.

The section provides:

> § 702. Exemptions
>
> This Title shall not apply to an employer with respect to the employment of aliens outside any State, or to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.

The first thing to note about section 702 is its descriptive subheading: "Exemptions." *See Hardin v. City*

Title & Escrow Co., 797 F.2d 1037, 1039 (D.C. Cir. 1986) (description of statutory provision contained in subheading that appears in enactment itself "constitutes an indication of congressional intent"); *House v. Commissioner*, 453 F.2d 982, 987 (5th Cir. 1972) (subheadings may aid courts in "com[ing] up with the statute's clear and total meaning"). Had Congress intended the interpretation given by the court below, it would have made far more sense to place the discussion of the rights of aliens in a section entitled "Inclusion of Aliens."

The fact that Title VII's applicability to religious entities appears in the same section further strengthens this conclusion. The meaning of section 702 with respect to religious institutions employing more than a specified number of workers is clear: absent the section, Title VII would cover them.[14] A similar interpretation should be

[14] Surely, the court of appeals would not have interpreted the latter part of section 702 as indicating the kind of employers (*i.e.*, groups that are not "religious corporation[s], association[s], educational institution[s], or societ[ies]") to which Title VII *was* intended to apply.

given to the part of section 702 dealing with aliens: absent section 702, any employer falling within the definitional provisions of sections 701(a), (b), (g), and (h) -- that is, a sufficiently large employer engaged in specified types of commerce -- would be subject to Title VII with respect to *all* its employees, including all aliens.

Section 703 gives additional support to this view. Section 703 protects "individual[s]." It does not limit its protection to citizens. Thus, had there been no mention of aliens in section 702, Title VII would still have protected aliens to the same extent it protected citizens.[15] Congress clearly understands the difference between providing protection to individuals and to citizens. *See, e.g.*, 42

[15] *Espinoza v. Farah Manufacturing Co.*, 414 U.S. 86, 95 (1973), is not to the contrary. There, this Court drew a "negative inference" from section 702 that aliens employed within the United States *were* covered. In other words, this Court held that a decision *to exempt* aliens in certain circumstances necessarily implied that they were *not* exempted in other circumstances.

The court of appeals' statement regarding Boureslan's attempt to draw a "negative inference" misperceives the nature of such an inference. The argument in favor of extraterritorial application does *not* depend on a negative inference. Rather, the fact that an exemption is created suggests that there is something from which exemption is necessary.

U.S.C. § 1981 ("*[a]ll persons* within the jurisdiction of the United States shall have the same right" with regard to certain activities "as is enjoyed by white *citizens*") (emphasis added). Indeed, the heightened scrutiny to which distinctions based on alienage are subject, *see, e.g., Graham v. Richardson*, 403 U.S. 365, 372 (1971), suggests that courts should be loath to adopt an interpretation of a statute that makes such a distinction in the absence of a clear congressional intention to do so. In short, the purpose of section 702 cannot have been to include domestic aliens within Title VII's protections.

Finally, the congressional and executive concerns with ensuring equality for all Americans in the international workplace and fostering nondiscrimination throughout the world strongly counsel interpreting section 702 as a narrow exemption from Title VII's commands rather than as a broad exemption. The justification for any alien exemption must lie in the potential conflict of laws that applying American

antidiscrimination law might create. Applying American laws abroad only when both parties to the employment relationship are American citizens -- that is, adopting the position advanced in this brief -- represents the most reasonable accommodation of these competing concerns. In cases involving two American entities, there is a far greater federal interest in applying United States statutes. Moreover, traditional principles of international law regarding acts of state and foreign compulsion remain available to alleviate particular conflicts. Thus, this Court should conclude that, in including section 702 within Title VII, Congress intended only to reduce the potential for statutory conflict by exempting a class of workers from Title VII's ambit as to whom the United States had a less significant relationship. Congress intended, however, to provide the maximum possible equal employment opportunity to each American citizen.

IV. Subsequent Legislation Also Demonstrates Congress' Intention To Provide Equal Employment Opportunity for American Citizens in the International Workplace

On several occasions subsequent to the original passage of Title VII, Congress has addressed the issue of equal economic access to the international marketplace for all Americans regardless of their ethnic or religious background. In particular, Congress' treatment of the Arab boycott buttresses the conclusion that Title VII was intended to have extraterritorial effect. *See generally*, Note, *The Arab Boycott and Title VII*, 12 Harv. C.R.-C.L. L. Rev. 181 (1977).

The Congressional declaration of policy accompanying the Export Administration Act states, among other things, that "[i]t is the policy of the United States . . . to oppose restrictive trade practices or boycotts fostered or imposed by foreign countries against . . . any United States person . . . ." 50 U.S.C. App. § 2402(5)(A). The Act requires the president to issue regulations prohibiting any United States

"person" (which includes any American corporation) from

> Refusing, or requiring any other person to refuse, to employ or otherwise discriminating against any United States person on the basis of race, religion, sex, or national origin of that person or of any owner, officer, director, or employee of such person.

Id. § 2407(a)(1)(B).

The legislative history of the Export Administration Amendments of 1977 expressly states that boycotts of U.S. companies "because of race, religion, or national origin . . . [are] clearly against the spirit and intent of U.S. law, including the civil rights and equal opportunity laws," and that the prohibition against discrimination in the Export Administration Act is intended to apply to "U.S.-controlled subsidiaries and affiliates abroad" except when there would be an "intractable conflict . . . with specific laws of foreign countries . . . ." H.R. Rep. No. 190, 95th Cong., 1st Sess. 51 (1977).

The exemption contained in the Act provides an appropriate model for construing Title VII's extraterritorial

effect. The Export Administration Act does provide an exemption for "compliance by a United States person resident in a foreign country or agreement by such person to comply with the laws of that country with respect to his activities exclusively therein." *Id.* § 2407(a)(2)(F). But that exemption is far narrower than the exemption judicially granted by the Fifth Circuit in this case. Note that the Export Administration Act exemption does *not* protect American employers when they *choose* to discriminate in a foreign country which does not *affirmatively require* such discrimination. In short, it merely codifies the defense of foreign compulsion. In this case, by contrast, there is no claim that Saudi Arabia *required* the harassment of Lebanese-American employees. And the Export Administration Act expressly provides that "[n]othing in this subsection may be construed to supersede or limit the operation of the antitrust or civil rights laws of the United States." *Id.* § 2407(a)(4).

Moreover, such a model would also be consistent with this Court's longstanding approach to another limitation on the scope of Title VII, the bona fide occupational qualification (BFOQ). *See Dothard v. Rawlinson*, 433 U.S. 321, 334 (1977) (the BFOQ "is an extremely narrow exception"); *see also Abrams*, 805 F.2d at 533 n. 7 (interpreting BFOQ to avoid collision with Export Administration Act); *Diaz v. Pan American World Airways*, 454 F.2d 234 (5th Cir.), *cert. denied*, 404 U.S. 950 (1971)(Title VII's broad remedial purposes are best served by reading any restrictions on the extent of its protections as narrowly as possible). In this case, this principle is best served by holding that Title VII does have an extraterritorial effect.

Thus, the Export Control Act and Congress' treatment of the Arab boycott in the legislative history show a profound congressional desire that American companies, including American companies operating abroad adhere to

the maximum extent possible to American principles of nondiscrimination. They represent the latest expression of a principle that has consistently been expressed since the 1950's. This pervasive concern with "'the right of Americans to engage in international commerce without being subjected to discrimination,'" H.R. Rep. 190 at 47 (additional views of Rep. Benjamin S. Rosenthal) (quoting President Jimmy Carter), militates strongly in favor of construing Title VII to have an extraterritorial effect.

The Export Control Act shows that Congress does not believe that American foreign policy objectives will be compromised by a general insistence that American corporations comply with principles of nondiscrimination. Indeed, it shows Congress' intention that these principles be limited only when they cause an irreconcilable conflict. This Court should interpret Title VII's extraterritorial effect in a parallel manner and deny American companies a blanket license to discriminate against American citizens overseas

CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the Fifth Circuit and hold that petitioners have stated a cause of action under Title VII.

Respectfully submitted,

PAMELA S. KARLAN
University of Virginia
School of Law
Charlottesville, VA 22901
(804) 924-7810

JULIUS LEVONNE CHAMBERS
*CHARLES STEPHEN RALSTON
The NAACP Legal Defense
and Educational Fund, Inc.
99 Hudson Street, 16th Floor
New York, N.Y. 10013
(212) 219-1900

AMY ADELSON
LOIS WALDMAN
MARC D. STERN
American Jewish
Congress
15 East 84th Street
New York, N.Y. 10028
(212) 879-4000

SAMUEL RABINOVE
The American Jewish
Committee
165 E. 56th Street
New York, N.Y. 10022
(212) 751-4000

RUTH L. LANSNER
STEVEN M. FREEMAN
JILL L. KAHN
The Anti-Defamation League
of B'nai B'rith
823 United Nations Plaza
New York, N.Y. 10017
(212) 490-2525

DONNA R. LENHOFF
Women's Legal Defense
Fund
2000 P Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 887-0364

*Counsel of Record

Attorneys for Amici Curiae

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

ALI BOURESLAN and
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Petitioners,

v.

ARABIAN AMERICAN OIL COMPANY and
ARAMCO SERVICES COMPANY,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

GARY B. BORN
Counsel of Record
W. HARDY CALLCOTT
MICHAEL C. SMALL
ELIZABETH KIINGI
WILMER, CUTLER & PICKERING
2445 M Street, N.W.
Washington, D.C. 20037
(202) 663-6000

ROBERT F. MULLEN
Co-Chairman
DAVID S. TATEL
Co-Chairman
NORMAN REDLICH
Trustee
BARBARA R. ARNWINE
THOMAS J. HENDERSON
RICHARD T. SEYMOUR
Lawyers' Committee for Civil Rights Under Law
1400 Eye Street, N.W.
Washington, D.C. 20005
(202) 371-1212

Dated: November 15, 1990

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Whether Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, prohibits employment discrimination outside the United States by a U.S. corporation against a U.S. citizen.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	v
INTEREST OF AMICUS CURIAE	1
SUMMARY OF ARGUMENT	2
ARGUMENT	6
I. CONGRESS EXPRESSLY EXTENDED THE GEOGRAPHIC REACH OF TITLE VII TO THE LIMITS OF FEDERAL POWER UNDER THE CONSTITUTION	6
A. The Plain Language of Title VII Extends the Act's Geographic Scope to the Limits of Federal Power Under the Constitution	7
B. The Legislative History of Title VII Demonstrates That the Act's Geographic Scope Extends to the Limits of Federal Power Under the Constitution	9
C. Title VII Expresses a Fundamental National Moral Commitment That is Applicable to U.S. Nationals Outside U.S. Territory	12
II. EVEN IF THE GEOGRAPHIC SCOPE OF TITLE VII WERE AMBIGUOUS, IT WAS ENACTED AGAINST THE BACKGROUND OF INTERNATIONAL CHOICE-OF-LAW PRINCIPLES THAT PERMIT THE EXTRATERRITORIAL APPLICATION OF U.S. LAWS	14
A. This Court Has Repeatedly Refused to Adopt Any Rigid Presumption That Federal Law Applies Only Within U.S. Territory	14

TABLE OF CONTENTS—Continued

Page

B. Rather Than Applying Any Rigid Presumption of Territoriality, This Court Has Repeatedly Held That the Reach of Ambiguous Federal Statutes Is Determined By Reference to International Choice-of-Law Principles 22

III. UNDER INTERNATIONAL CHOICE-OF-LAW PRINCIPLES, TITLE VII APPLIES TO EMPLOYMENT DISCRIMINATION OUTSIDE THE UNITED STATES BY A U.S. COMPANY AGAINST A U.S. CITIZEN 25

CONCLUSION 30

TABLE OF AUTHORITIES

CASES

Page

Allstate Insurance Co. v. Hague, 449 U.S. 302 (1981) 11

American Banana Co. v. United Fruit Co., 213 U.S. 347 (1909) 4, 15, 16, 19

Asahi Metal Industry Co. v. Superior Court, 480 U.S. 102 (1987) 26

Babcock v. Jackson, 12 N.Y.2d 473, 240 N.Y.S.2d 743 (1963) 26

Bartholomew v. Universe Tankships, Inc., 263 F.2d 437 (2d Cir. 1959) 23

Benz v. Compania Naviera Hidalgo, S.A., 353 U.S. 138 (1957) 11, 21

Blackmer v. United States, 284 U.S. 421 (1932) 15, 26

Blum v. Stenson, 465 U.S. 886 (1984) 7

Bob Jones University v. United States, 461 U.S. 574 (1983) 13

Bowen v. Michigan Academy of Family Physicians, 476 U.S. 667 (1986) 15

CFTC v. Nahas, 738 F.2d 487 (D.C. Cir. 1984) 8

Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690 (1962) 4, 19

Cook v. Tait, 265 U.S. 47 (1924) 26

Daniel v. Paul, 395 U.S. 298 (1969) 10

FTC v. Compagnie de Saint-Gobain-Pont-a-Mousson, 636 F.2d 1300 (D.C. Cir. 1980) 8

Fernandez v. Wynn Oil Co., 653 F.2d 1273 (9th Cir. 1981) 29

Fogleman v. Aramco, 623 F. Supp. 908 (W.D. La. 1985) 9

Foley Brothers, Inc. v. Filardo, 336 U.S. 281 (1949) 11, 15, 16, 21

Franks v. Bowman Transportation Co., 424 U.S. 747 (1976) 3, 13

Grunenthal GmbH v. Hotz, 712 F.2d 421 (9th Cir. 1983) 20

Hamm v. City of Rock Hill, 379 U.S. 306 (1964) 13

Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964) 10

TABLE OF AUTHORITIES—Continued

	Page
Helicopteros Nacionales de Colombia v. Hall, 466 U.S. 408 (1984)	11
Hellenic Lines Ltd. v. Rhoditis, 398 U.S. 306 (1970)	23
Hilton v. Guyot, 159 U.S. 113 (1895)	16
Home Insurance Co. v. Dick, 281 U.S. 397 (1930)	11
Interamerican Refining Corp. v. Texaco Maracaibo, Inc., 307 F. Supp. 1291 (D. Del. 1970)	29
International Longshoremen's Association, Local 1416 v. Ariadne Shipping Co., 397 U.S. 195 (1970)	21
International Shoe Co. v. Washington, 326 U.S. 310 (1945)	16
Katzenbach v. McClung, 379 U.S. 294 (1964)	10
Kern v. Dynalectron Corp., 577 F. Supp. 1196 (N.D. Tex. 1983), *aff'd*, 746 F.2d 810 (5th Cir. 1984)	29
Laker Airways Ltd. v. Sabena, Belgian World Airlines, 731 F.2d 909 (D.C. Cir. 1984)	28
Lauritzen v. Larsen, 345 U.S. 571 (1953)	5, 22, 25, 26, 28
Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287 (3rd Cir. 1979)	24
McCulloch v. Sociedad Nacional de Marineros, 372 U.S. 10 (1963)	11, 16, 21
McGee v. International Life Insurance Co., 355 U.S. 220 (1957)	26
Montreal Trading Ltd. v. Amax Inc., 661 F.2d 864 (10th Cir. 1981), *cert. denied*, 455 U.S. 1001 (1982)	24
Montship Lines, Ltd. v. Federal Maritime Board, 295 F.2d 147 (D.C. Cir. 1961)	8
NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937)	11
North Carolina Department of Transportation v. Crest Street Community Council, 479 U.S. 6 (1986)	8
Park 'N Fly v. Dollar Park and Fly, Inc., 469 U.S. 189 (1985)	7
Pennoyer v. Neff, 95 U.S. 714 (1878)	16

TABLE OF AUTHORITIES—Continued

	Page
Polish National Alliance v. NLRB, 322 U.S. 643 (1944)	3, 11
Psimenos v. E.F. Hutton & Co., 722 F.2d 1041 (2d Cir. 1983)	20
Ramirez & Feraud Chili Co. v. Las Palmas Food Co., 146 F. Supp. 594 (S.D. Cal. 1956), *aff'd*, 245 F.2d 874 (9th Cir. 1957)	24
Randall v. Aramco, 778 F.2d 1146 (5th Cir. 1985)	9
Romero v. International Terminal Operating Co., 358 U.S. 354 (1959)	23
Schooner Exchange v. M'Faddon, 11 U.S. (7 Cranch) 116 (1812)	16
Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479 (1985)	15
Skiriotes v. Florida, 313 U.S. 69 (1941)	25
Societe Internationale Pour Participations Industrielles et Comerciales, S.A. v. Rogers, 357 U.S. 197 (1958)	20, 27, 29
Societe Nationale Industrielle Aerospatiale v. U.S. District Court, 482 U.S. 522 (1987)	*passim*
State Bank of India v. NLRB, 808 F.2d 526 (7th Cir. 1986), *cert. denied*, 483 U.S. 1005 (1987)	21
Steele v. Bulova Watch Co., 344 U.S. 280 (1952)	*passim*
Sumitomo Shoji America, Inc. v. Avagliano, 457 U.S. 176 (1982)	18
Symonette Shipyards, Ltd. v. Clark, 365 F.2d 464 (5th Cir. 1966)	23
Tamari v. Bache & Co. (Lebanon), 730 F.2d 1103 (7th Cir.), *cert. denied*, 469 U.S. 871 (1984)	20
The Apollon, 22 U.S. (9 Wheat.) 361 (1824)	16
The Charming Betsy, 6 U.S. (2 Cranch) 64 (1804)	16
Timberlane Lumber Co. v. Bank of America N.T. & S.A., 549 F.2d 597 (9th Cir. 1976) *aff'd*, 749 F.2d 1378 (9th Cir. 1984), *cert. denied*, 472 U.S. 1032 (1985)	24, 28
United States v. Albertini, 472 U.S. 675 (1985)	7, 15

TABLE OF AUTHORITIES—Continued

	Page
United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945)	5, 19, 24, 25
United States v. Baker, 609 F.2d 134 (5th Cir. 1980)	20
United States v. Bowman, 260 U.S. 94 (1922)	26, 28
United States v. Brown, 549 F.2d 954 (4th Cir. 1977)	20
United States v. First National City Bank, 396 F.2d 897 (2d Cir. 1968)	8
United States v. Locke, 471 U.S. 84 (1985)	7
United States v. Menasch, 348 U.S. 528 (1955)	7
United States v. Sisal Sales Corp., 274 U.S. 268 (1927)	19
University of Pennsylvania v. EEOC, 110 S. Ct. 577 (1990)	7
United States v. Wright-Barker, 784 F.2d 161 (3d Cir. 1986)	20
Vanity Fair Mills, Inc. v. T. Eaton Co., 234 F.2d 633 (2d Cir.), *cert. denied*, 352 U.S. 871 (1956)	23
Vespa of America Corp. v. Bajaj Automobile Ltd, 550 F. Supp. 224 (N.D. Cal. 1982)	23
Weinberger v. Rossi, 456 U.S. 25 (1982)	15
Wells Fargo & Co. v. Wells Fargo Express Co., 556 F.2d 406 (9th Cir. 1977)	24
Wickard v. Filburn, 317 U.S. 111 (1942)	9, 10
W.S. Kirkpatrick v. Environmental Tectonics Corp., 110 S. Ct. 701 (1990)	19
Zenith Radio Corp. v. Hazeltine Research Corp., 395 U.S. 100 (1969)	19
Zoelsch v. Arthur Andersen & Co., 824 F.2d 27 (D.C. Cir. 1987)	20

STATUTES AND LEGISLATIVE MATERIALS

15 U.S.C. § 1	19
15 U.S.C. § 2	19
15 U.S.C. § 77b(7)	20
46 U.S.C. App. § 688(a)	22
50 U.S.C. App. § 451	26
110 Cong. Rec. 1511 & 7208-12 (1964)	3, 9, 10, 11

TABLE OF AUTHORITIES—Continued

	Page
Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*...*passim*	
Committee on Ways and Means, U.S. House of Representatives, *Overview and Compilation of U.S. Trade Statutes* (1989)	17
EEOC, *Legislative History of Titles VII and XI of Civil Rights Act of 1964*	9, 10, 11, 12, 14
Federal Reserve Act of 1913, 12 U.S.C. §§ 601-6014a	17
Foreign Assistance Act of 1962 (The Hickenlooper Amendment), 22 U.S.C. § 2370(e)	17
Foreign Corrupt Practices Act of 1977, 15 U.S.C. § 78dd-1(a)	17, 26
Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1602-1611	17
Foreign Trade Antitrust Improvements Act of 1982, 15 U.S.C. §§ 6a, 45(a)(3)	17
H.R. Rep. No. 1370, 87th Cong., 2d Sess. (1962)	14
H.R. Rep. No. 570, 88th Cong., 1st Sess. (1963)	9
H.R. Rep. No. 914, 88th Cong., 1st Sess. (1963)	9, 12, 14

BOOKS AND ARTICLES

Akehurst, *Jurisdiction in International Law*, 46 Brit. Y.B. Int'l L. 145 (1974)	18
C. Brauer, *John F. Kennedy and the Second Reconstruction* (1977)	13
Dudziak, *Desegregation As a Cold War Imperative*, 41 Stan. L. Rev. 61 (1988)	13
Lowenfeld, *Public Law in the International Arena: Conflict of Laws, International Law and Some Suggestions for Their Interaction*, 163 Recueil des Cours 321 (1979)	18
1 J. Moore, *Moore's Federal Practice* ¶ 0.77[2.-3] (2d ed. 1990)	9
Restatement (Second) Conflict of Laws (1971)	26
Restatement (Second) Foreign Relations Law (1965)	5, 21
Restatement (Third) Foreign Relations Law (1987)	*passim*

TABLE OF AUTHORITIES—Continued

	Page
D. Rosenthal & B. Knighton, *National Laws and International Commerce* (1982)	18
J. Story, *Commentaries on the Conflict of Laws* (7th ed. 1972)	16
Wallace, *Extraterritorial Jurisdiction*, 15 Law & Pol'y Int'l Bus. 1099 (1983)	18
H. Wheaton, *Elements of International Law* (1866)	16
The Annual Report of the Council of Economic Advisors (Feb. 1990)	4, 17
The World Almanac and Book of Facts: 1990 (1989)	27
MISCELLANEOUS	
Bureau of the Census, U.S. Dep't of Commerce, *Statistical Abstract of the United States:* 1947 (68th ed. 1947)	17
Bureau of the Census, U.S. Dep't of Commerce, *Statistical Abstract of the United States:* 1987 (107th ed. 1986)	17
Convention on the Elimination of All Forms of Racial Discrimination, G.A. Res. 2106, 20 U.N. GAOR Supp. (No. 14), U.N. Doc. A/4354 (1965)	28
Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 34/180, U.N. GAOR Supp. (No. 46), U.N. Doc. A/34/46 (1979)	28
Convention Concerning Discrimination in Respect of Employment and Occupation, June 25, 1958, 362 U.N.T.S. 31	28
Economic Report of the President (Feb. 1990)	17
Pub. Papers (John F. Kennedy, Feb. 28, 1963)	13
Pub Papers (John F. Kennedy, June 11, 1963)	13
Pub Papers (John F. Kennedy, Sept. 20, 1963)	13
U.S. Dep't of Commerce, *United States Trade: Performance in 1988* (1989)	17
U.S. Dep't of Justice, *Antitrust Enforcement Guidelines for International Operations* (1988)	19, 24

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BRIEF OF THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

This amicus curiae brief is submitted in support of petitioners, Ali Boureslan and the Equal Employment Opportunity Commission. By letters filed with the Clerk of the Court, petitioners and respondents have consented to the filing of this brief.

INTEREST OF AMICUS CURIAE

The Lawyers' Committee is a nonprofit organization established in 1963 at the request of the President of the United States to involve leading members of the bar throughout the country in the national effort to ensure civil rights to all Americans. As part of this effort, the Lawyers' Committee has represented parties and participated as an *amicus* in several Title VII cases before this Court.

This case raises important issues concerning the geographic scope of the application of Title VII that may affect employment discrimination litigation in which the Lawyers' Committee will participate. The significance of these issues is magnified by the increasingly international character of U.S. industry and employment opportunities. The Lawyers' Committee has a long-standing interest in persuading the Court to adopt principles that will result in the sound administration of Title VII. Finally, leading members of the bar associated with the Lawyers' Committee played a role in the legislative process culminating in the enactment of Title VII, and therefore, are uniquely competent to offer views regarding the principles and history associated with the legislation.

SUMMARY OF ARGUMENT

The question presented in this case is whether Title VII of the Civil Rights Act of 1964 prohibits employment discrimination outside the United States by a U.S. corporation against a U.S. citizen. The Court of Appeals held that it does not. The court reasoned that a federal statute is not ~~applic~~able extraterritorially to conduct occurring outside the United States absent clear statutory language dictating such a result, and that Title VII contains no such language.

I.

The Court of Appeals erred by substituting a judicially-created presumption for Congress' plain words and manifest intent. Title VII declares a fundamental national commitment to eradicate racial, religious, gender, and other forms of discrimination in employment. Consistent with this high objective, Congress and the President made Title VII broadly applicable to the limits of federal power: the Act extends to employment discrimination by all employers whose enterprises "affect" commerce "among the several states; or between a State and any place outside thereof." 42 U.S.C. § 2000e(g). Thus, by its plain terms, Title VII reaches *all* discriminatory acts—wherever they may occur—by those employers who affect comerce.

Moreover, the legislative history of the Civil Rights Act of 1964 shows that Congress intended the Act's anti-discrimination provisions to reach to the full extent permitted by the Constitution. Title VII's legislative history states specifically that the Act extends to "that commerce to which the regulatory power of Congress extends." 110 Cong. Rec. 7212 (1964). Similarly, in discussing Title VII's definition of "commerce," the Act's drafters repeatedly cited *Polish National Alliance v. NLRB*, 322 U.S. 643, 647 (1944), in which this Court characterized a similar statute as Congress' effort "to regulate all conduct having such consequences that constitutionally it can regulate."

It was only natural that Congress wanted the geographic scope of Title VII to extend to the limits of the Constitution. Title VII states the fundamental moral commitment of this Nation—as a matter of "highest priority," *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 763 (1976)—to eradicate employment discrimination. Similarly, the Act's legislative history evinces a profound concern for the effect of employment discrimination upon U.S. international relations. As President Kennedy told the United Nations when describing a bill that would become Title VII: "The United States of America is opposed to discrimination and persecution on grounds of race and religion *anywhere in the world.*"

II.

Even if we put to one side the plain language and manifest intent of Title VII, the Court of Appeals erred in adopting a rigid presumption that federal law applies only within U.S. territory. This presumption of territoriality was derived from 18th and 19th century public international law principles, as well as from the assumption that Congress is not concerned with international matters. Neither generalization retains vitality in today's interdependent global economy.

First, it is no longer true that Congress is concerned only with domestic matters. During this century, bur-

geoning transnational business activities and increasing economic interdependence have demanded sustained federal legislative attention. "In today's highly integrated world economy, international economic policy issues are inseparably intertwined with domestic policy issues." *The Annual Report of the Council of Economic Advisers*, 264 (Feb. 1990). As a consequence, Congress has repeatedly concerned itself with international matters, enacting scores of major statutes that regulate transnational and foreign conduct. And other developed nations have done the same.

Second, this century has witnessed profound changes in public international law. During the 18th and 19th centuries, international law was generally understood as erecting strict territorial limits to national jurisdiction. *American Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909). But contemporary authorities, including the Restatement (Third) Foreign Relations Law, make it clear that territoriality is not the sole legitimate basis for national jurisdiction under international law.

This Court's decisions illustrate the extent to which archaic notions of strict territoriality have been abandoned. Without any specific statutory instruction to apply the Sherman Act and other antitrust laws extraterritorially, this Court has repeatedly done so in recent decades. *E.g., Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962). Indeed, the Court has expressly overruled its earlier decision in *American Banana*, where a presumption of territoriality was invoked to hold the antitrust laws applicable only to conduct within the United States. Similarly, the Lanham Act has been applied extraterritorially by this Court, notwithstanding the absence of any language specifically requiring such a result. *Steele v. Bulova Watch Co.*, 344 U.S. 280 (1952). Finally, again without a specific statutory mandate, it is clear that the federal securities laws apply to conduct that takes place wholly outside the United States. *See* Restatement (Third) Foreign Relations Law § 416 (1987) (citing authorities).

Rather than reflecting any strict presumption of territoriality, this Court's decisions are instead based upon the more natural conclusion that Congress legislates against the background of international choice-of-law principles, and that it is these principles that should inform the construction of federal statutes. Thus, in *Lauritzen v. Larsen*, 345 U.S. 571, 583 (1953), the Court interpreted the Jones Act's broad jurisdictional grant in light of historic "choice of law" rules. The same approach was taken in other leading international decisions, including *Steele v. Bulova Watch Co.*, 344 U.S. 280 (1952), *Societe Nationale Industrielle Aerospatiale v. U.S. District Court*, 482 U.S. 522 (1987), and *United States v. Aluminum Co. of America*, 148 F.2d 416, 443 (2d Cir. 1945).

In light of these cases, the recent Restatement (Third) of Foreign Relations Law (1987) specifically *deleted* a provision, set forth in § 38 of the Restatement (Second) of Foreign Relations Law (1965), stating that federal statutes were presumed to apply only within U.S. territory. In its place, the Third Restatement provides that a "rule of reason," based upon this Court's international choice-of-law rules, establishes the appropriate reach of federal legislation. Restatement (Third) Foreign Relations Law §§ 402 comment i, 403 comment a (1987).

III.

Under the international choice-of-law decisions of this Court, it is plain that Title VII applies to respondents' alleged misconduct. Respondents, Delaware corporations, are concededly U.S. nationals. This Court has long recognized that nationality is a wholly legitimate basis for the extraterritorial application of U.S. laws. U.S. statutes dealing with a wide range of subjects expressly apply to U.S. nationals wherever they may be, and nationality has been a vital factor in this Court's decisions determining the reach of other federal statutes. Moreover, the petitioner in this case is a U.S. national. Numerous decisions of this and other courts affirm the legitimate

interest of a State in providing effective legal relief for its citizens, even when they are abroad.

Employment discrimination abroad by major companies (like respondents) will also have substantial effects within the United States. More than 2 million Americans work abroad, and advancement in many major U.S. companies depends increasingly upon successful performance in overseas assignments. Denying U.S. citizens the protections of Title VII during such assignments will affect their ability to rise to positions of responsibilities here in the United States. And the tolerance of race or sex discrimination in overseas operations of a U.S. company can invidiously affect domestic attitudes.

Finally, Title VII expresses a U.S. policy—eliminating employment discrimination—to which Congress attached the "highest priority." No showing has been made that Saudi Arabian law conflicts with that policy in this case, either by requiring or encouraging private bias. Given Title VII's alien exclusion, as well as the broad international consensus against discrimination, such conflicts are unlikely to arise with any frequency. And if they do, international choice-of-law rules could take such conflicts into account and might in some cases provide some defense to Title VII violations. But this case presents no such conflict.

ARGUMENT

I. CONGRESS EXPRESSLY EXTENDED THE GEOGRAPHIC REACH OF TITLE VII TO THE LIMITS OF FEDERAL POWER UNDER THE CONSTITUTION

The plain language and legislative history of Title VII extend the protections of the Act to U.S. citizens whether or not they are within U.S. territory. The Court of Appeals ignored Congress' words and intent, choosing instead to give effect to a judicially-created presumption that federal statutes apply only within the United States. In so doing, the lower court abandoned its proper task

of ascertaining legislative intent.[1] And it violated this Court's admonition that statutory interpretation is primarily concerned with the statute's plain language.[2]

A. The Plain Language of Title VII Extends the Act's Geographic Scope to the Limits of Federal Power Under the Constitution

Title VII makes it unlawful for an "employer" to discriminate based on race, religion, sex, or national origin. 42 U.S.C. § 2000e-2. "Employer" is defined as "a person engaged in an industry affecting commerce" who has fifteen or more employees. 42 U.S.C. § 2000e(b). "Commerce" is, in turn, defined as trade "among the several States; *or between a State and any place outside thereof.*" 42 U.S.C. § 2000e(g) (emphasis supplied). By their plain terms, these provisions of Title VII extend to employment discrimination anywhere in the world by any fifteen-person employer who "affect[s]" trade "between a State and any place outside thereof."[3]

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[1] *See United States v. Albertini*, 472 U.S. 675, 680 (1985); *United States v. Locke*, 471 U.S. 84, 95-96 (1985); pp. 14-15 *infra*.

[2] *See, e.g., Park'N Fly v. Dollar Park and Fly, Inc.*, 469 U.S. 189, 194 (1985) ("Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose"); *Blum v. Stenson*, 465 U.S. 886, 896 (1984) ("Where, as here, resolution of a question of federal law turns on a statute and the intent of Congress, we look first to the statutory language and then to the legislative history if the statutory language is unclear"); *cf. University of Pennsylvania v. EEOC*, 110 S. Ct. 577, 583 (1990) (relying on plain language of Title VII).

[3] The term "State" is defined expansively in 42 U.S.C. § 2000e(i) to include all possessions of the U.S. The "between a State and any place outside thereof" clause in the definition of "commerce" can only apply to commerce between the U.S. and other countries, because there is no place within the U.S. that is not also within a State, as defined in Title VII. Respondents' reading of the statute would render the "between a State and any place outside thereof" clause in § 2000e(g) superfluous, contrary to familiar principles of statutory construction. *See United States v. Menasch*, 348 U.S. 528, 538-39 (1955) (court must "give effect, if possible, to every clause and word of a statute").

Nothing in Title VII even remotely suggests any exemption or immunity for unlawful discrimination by employers against U.S. nationals outside of U.S. territory. On the contrary, § 2000e-1 exempts from the statute "an employer with respect to the employment of aliens outside any State[.]" Unless Title VII was generally intended to have extraterritorial application, there would have been no reason to specifically exclude aliens from its protections when they are abroad.[4]

[4] The Court of Appeals found Title VII "curiously silent" on questions such as subpoenas for overseas violations, venue for overseas violations, and conflicts with foreign laws. U.S. Cert. Pet. 5a. Even if such purported anomalies existed, it is improper to "ignore the plain language of a statute to avoid a possibly anomalous result": "[t]he short answer is that Congress did not write the statute that way." *North Carolina Dep't of Transp. v. Crest Street Community Council*, 479 U.S. 6, 14 (1986) (quoting *Garcia v. United States*, 469 U.S. 70, 79 (1984)). In any event, the anomalies cited by the lower courts do not exist.

Section 2000e-9 provides the EEOC with the investigatory and subpoena authority enjoyed by the National Labor Relations Board. Under § 161(2) a subpoena can be served within the United States on a U.S. or other company wherever it may be found—which at a minimum encompasses where its offices may be located. Although served in the United States, that subpoena can demand documents and other materials located outside U.S. territory. *See United States v. First National City Bank*, 396 F.2d 897 (2d Cir. 1968); *Montship Lines, Ltd. v. Federal Maritime Board*, 295 F.2d 147 (D.C. Cir. 1961); Restatement (Third) Foreign Relations Law § 442 (1987). Under § 161(5) an EEOC subpoena likely may not be *served* outside the United States, but given the preceding authorities this is not an obstacle to effective investigations. Moreover, other agencies that enforce statutes that are clearly applicable extraterritorially have long operated with the same constraint, which is derived from international law concerns about serving compulsory process within foreign territory. *See Commodity Futures Trading Commission v. Nahas*, 738 F.2d 487 (D.C. Cir. 1984); *FTC v. Compagnie de Saint-Gobain-Pont-a-Mousson*, 636 F.2d 1300 (D.C. Cir. 1980).

Section 2000e-5(f)(3) provides a host of venue choices, including the judicial district where employment records are located and where a respondent's "principal office" is located. In virtually all cases, employers subject to Title VII will have their principal corporate office in the United States. And in those few cases where

B. The Legislative History of Title VII Demonstrates That the Act's Geographic Scope Extends to the Limits of Federal Power Under the Constitution

The legislative history of Title VII compels the same conclusion as the language of the statute: Congress intended to eradicate discrimination to the full geographic extent of its power over both domestic and foreign commerce under the Constitution. An interpretive memorandum read into the Congressional Record by the floor managers of Title VII in the Senate stated exactly this:

> Title VII covers discriminatory practices by employers engaged in industries affecting commerce, as defined in the title . . . . [*Commerce*] *is, in short, that commerce to which the regulatory power of Congress extends*[.] [5]

Both proponents and opponents of Title VII in the House Judiciary Committee cited *Wickard v. Filburn*, 317 U.S. 111 (1942), as defining the scope of the bill.[6] *Wick-*

an employer's corporate headquarters is abroad, the Act's reference to "principal office" is sufficiently flexible to include the employer's principal office in the U.S. *Cf. Randall v. Aramco*, 778 F.2d 1146, 1148 (5th Cir. 1985); *Fogleman v. Aramco*, 623 F. Supp. 908, 910 (W.D. La. 1985); 1 Moore's Federal Practice ¶ 0.77[2.-3], at 717.47-.48 (2d ed. 1990).

Finally, even if Title VII contained no specific provisions dealing with conflicts between the Act and foreign law, that is because this Court has long resolved such conflicts based on international choice-of-law principles. See pp. 22-25 *infra*. There are, for example, no provisions of the Sherman Act, the Lanham Act, the Jones Act or the federal securities laws covering conflicts with foreign law—yet it is clear that all these laws apply extraterritorially. In any event, the alien exclusion was specifically included in the Act to avoid conflicts with foreign laws. H.R. Rep. No. 570, 88th Cong., 1st Sess. 4 (1963) (purpose of exemption is to "remove conflicts of law" between Title VII and foreign law).

[5] 110 *Cong. Record* 7212 (1964) (emphasis supplied), *reprinted in* EEOC, *Legislative History of Titles VII and XI of Civil Rights Act of 1964* 3039, 3041 (hereinafter, "EEOC Legislative History").

[6] *See* H.R. Rep. No. 914, 88th Cong., 1st Sess. at 108 (1963) (Views of Reps. Poff and Cramer), *reprinted in* EEOC Legislative History at 2108; *id.* Part II at 13 (Views of Rep. McCulloch et

ard was clearly understood then—as it is now—as upholding a statutory scheme that was as broad as Congress could enact under the Commerce Clause.[7] And finally, this Court has read the definition of "commerce" in Title II of the 1964 Civil Rights Act, which is parallel to the definition in Title VII,[8] to include all commerce Congress can constitutionally regulate.[9]

Moreover, Title VII's supporters relied on Congress' authority to regulate both interstate and *foreign* commerce. For example, Senator Clark cited the opinion of U.S. Deputy Attorney General Katzenbach relying on Congress' power over foreign commerce.[10] Senator Clark also cited an opinion of the Lawyers' Committee concluding that "[e]mployers, employment agencies as well as labor

al.), *reprinted in* EEOC Legislative History at 2134. The proponents cited *Wickard* to demonstrate the constitutionality of the bill; the opponents cited the case in an attempt to prove that the coverage of the legislation would be too broad as a policy matter.

[7] *Wickard* upheld as consistent with the Commerce Clause a penalty against a wheat farmer for grain grown for his own use. The Court extensively discussed the international nature of the market for wheat, and relied upon Congress' power to regulate both interstate commerce and foreign commerce to uphold the statutory scheme at issue. *Wickard*, 317 U.S. at 125-26.

[8] A memorandum written by the Lawyers' Committee and read into the Congressional Record by the floor managers of the Act specifically analogized the scope of "commerce" for the purposes of Title II and Title VII, stating: "[t]he same considerations which support the conclusion that the public accommodations title [Title II] is valid under the commerce clause . . . are equally applicable here [to Title VII]." 110 *Cong. Rec.* 7208 (1964), *reprinted in* EEOC Legislative History at 3077.

[9] *See Daniel v. Paul*, 395 U.S. 298 (1969); *Katzenbach v. McClung*, 379 U.S. 294 (1964); *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964).

[10] 110 *Cong. Rec.* 7209 (1964), *reprinted in* EEOC Legislative History at 3078 ("We believe that the commerce clause of the Constitution (art. I, sec. 8) provides authority for Congress to enact fair employment practices legislation. The courts have repeatedly upheld the power of Congress to regulate employment relations affecting interstate *and foreign* commerce") (emphasis supplied).

organizations whose business or activities affect interstate *or foreign* commerce are clearly subject to congressional legislative authority."[11] And finally, the Katzenbach opinion, and other materials, relied specifically upon *Polish National Alliance v. NLRB*, 322 U.S. 643, 647 (1944). There, this Court held that Congress, by adopting a definition of commerce identical to that in Title VII, "has undertaken to regulate all conduct having such consequences that constitutionally it can regulate."[12]

Future cases may involve employers and employees whose activities have so little relation with this country that the Constitution would preclude application of Title VII by a U.S. court.[13] But respondents properly concede that Congress could constitutionally reach their conduct,

[11] *Id., reprinted in* EEOC Legislative History at 3077 (emphasis supplied). Similarly, Representative Cellar said: "Title VII covers employers engaged in industries affecting commerce, that is to say, interstate *and foreign* commerce." 110 *Cong. Record* 1511 (1964), *reprinted in* EEOC Legislative History at 3091 (emphasis supplied). The Senate bill (which ultimately became law) omitted the preamble to the House bill, which had specifically stated that it was intended "To remove obstructions to the free flow of commerce among the States and with foreign nations." But this deletion is irrelevant; the debate cited above demonstrates that the Senate, like the House, was relying on power over foreign commerce when it passed Title VII, and the Senate accordingly expected that Title VII would in fact affect foreign commerce.

[12] And all of the opinions discussed above cited *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 31 (1937), where this Court interpreted a definition of commerce identical to that in Title VII as reaching both "interstate and foreign" commerce. By contrast, we have been unable to locate anywhere in the voluminous legislative history of Title VII any citation to the three cases principally relied upon by Aramco in the court below—*Foley Bros., Inc. v. Filardo*, 336 U.S. 281 (1949); *McCulloch v. Sociedad Nacional de Marieneros*, 372 U.S. 10 (1963), or *Benz v. Compania Naviera Hidalgo, S.A.*, 353 U.S. 138 (1957).

[13] The Due Process Clause could limit either legislative jurisdiction, *see Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981); *Home Ins. Co. v. Dick*, 281 U.S. 397 (1930), or personal jurisdiction, *see Helicopteros Nacionales de Colombia v. Hall*, 466 U.S. 408 (1984).

Cert. Opp. at 20-23, and that should be the end of the matter.

C. Title VII Expresses a Fundamental National Moral Commitment That is Applicable to U.S. Nationals Outside U.S. Territory

It is only natural that Title VII's geographic scope extend to the full limits of federal power under the Constitution. Congress and the President emphatically said that Title VII was a fundamental moral commitment by this Nation of the highest order, and they repeatedly linked the high goals of Title VII to the international standing and relations of the United States. It would be wholly implausible to conclude that they did not want an overriding commitment of this character to extend to the full limits of federal authority.

In enacting Title VII, Congress explicitly declared its intent to resolve a pressing moral wrong:

> [T]his ~~bill~~ can and will commit our nation to the elimination of many of the worst manifestations of racial prejudice. This is of paramount importance and is long overdue. The practices of American democracy must conform to the spirit which motivated the Founding Fathers of this Nation—the ideals of freedom, democracy, justice and opportunity. The entire Nation must meet this challenge, and it must do so now.[14]

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[14] H.R. Rep. No. 914, 88th Cong., 1st Sess., pt. 2, at 2 (1963), *reprinted in* EEOC Legislative History at 2122. (views of Rep. McCulloch). As Representative McCulloch eloquently stated:

> [W]e believe in the creation of job equality because it is the right thing to do. We believe in the inherent dignity of man. He is born with certain inalienable rights. His uniqueness is such that we refuse to treat him as if his rights and well-being are bargainable. All vestiges of inequality based solely on race must be removed in order to preserve our democratic society, to maintain our country's leadership and to enhance mankind.

Id. at 30, *reprinted in* EEOC Legislative History at 2151.

President Kennedy, discussing the bill that became Title VII, struck the same theme in his final address to the United Nations.[15] And this Court has observed how Congress "ordained that its policy of outlawing [employployment] discrimination should have the 'highest priority' " [16]

Finally, unlike ordinary labor legislation, concerns about the international consequences of employment discrimination were a fundamental reason for enactment of Title VII. When he first proposed the bill, President Kennedy cited "the discriminatory treatment suffered by too many foreign diplomats, students and visitors to this country." [17] And he later emphasized that the Nation's racial injustices undermined our worldwide efforts to advance the cause of freedom.[18] Similarly, the House reports on the 1964 Civil Rights Act urged that the bill was necessary to combat

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[15] *See* "Address Before the 18th General Assembly of the United Nations," *Pub. Papers* 697 (Sept. 20, 1963) ("I hope that not only our Nation but other multiracial societies will meet these standards of fairness and justice"). As this Court has noted, the Executive Branch has consistently demonstrated its commitment to "the fundamental policy of eliminating racial discrimination." *Bob Jones University v. United States*, 461 U.S. 574, 595 (1983).

[16] *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 763 (1976) (citations omitted) (*quoting Newman v. Piggie Park Enterps., Inc.*, 390 U.S. 400, 402 (1968)). *See Hamm v. City of Rock Hill*, 379 U.S. 306, 317 (1964) ("Congress has exercised its constitutional power in enacting the Civil Rights Act of 1964 and declared that the public policy of our country is to prohibit discrimination").

[17] "Special Message to the Congress on Civil Rights," *Pub. Papers* 230 (Feb. 28, 1963). President Kennedy went on to say "But it is not enough to treat those from other lands with equality and dignity—the same treatment must be afforded to every American citizen." *Id.*

[18] "Radio and Television Report to the American People on Civil Rights," *Pub. Papers* 469 (June 11, 1963) ("We preach freedom around the world, and we mean it, and we cherish our freedom here at home, but are we to say to the world, and much more importantly, to each other that this is a land of the free, except for the Negroes . . .?"); *see generally* C. Brauer, *John F. Kennedy and the Second Reconstruction* 276-78 (1977); Dudziak, *Desegregation as a Cold War Imperative*, 41 Stan. L. Rev. 61 (1988).

totalitarian regimes abroad,[19] as well as to preserve the global competitive position of the U.S. and present an example to newly-emerging nations.[20]

II. EVEN IF THE GEOGRAPHIC SCOPE OF TITLE VII WERE AMBIGUOUS, IT WAS ENACTED AGAINST THE BACKGROUND OF INTERNATIONAL CHOICE-OF-LAW PRINCIPLES THAT PERMIT THE EXTRATERRITORIAL APPLICATION OF U.S. LAWS

A. This Court Has Repeatedly Refused to Adopt Any Rigid Presumption That Federal Law Applies Only Within U.S. Territory

Quite apart from its misreading of the plain language and manifest intent of Title VII, the Court of Appeals erred in adopting a rigid "presumption against extraterritorial application of a [federal] statute." U.S. Cert. Pet. at 2a. This Court has long recognized that presumptions and other principles of statutory construction are not rules of law, but are instead common-sense guides to ascertaining what Congress likely intended. As Chief Justice Rehnquist has explained:

> Generalities about statutory construction help us little. They are not rules of law but merely axioms

[19] *See* H.R. Rep. No. 914, 88th Cong., 1st Sess., Pt. 2, at 17 (1963) *reprinted in* EEOC Legislative History at 2128 ("Our Nation is engaged today in cold war combat with an alien ideology. On every front—military, economic, political, and social—we must demonstrate the worth of our system").

[20] *See* H.R. Rep. No. 1370, 87th Cong., 2d Sess. at 3 (1962), *reprinted in* EEOC Legislative History at 2157 ("In addition to creating unfavorable impressions among the free peoples of the world, employment discrimination . . . poses a distinct threat to the Nation's ability to maintain its competitive position in the world"); *see also id.* at 2, EEOC Legislative History at 2156 ("Among other peoples of the free world, especially the peoples of the newly emerging and uncommitted nations, continued employment discrimination in the United States casts doubt upon our sincerity in furthering the cause of individual liberty and human dignity").

> of experience. They do not solve the special difficulties in construing a particular statute. The variables render every problem of statutory construction unique.[21]

Or, as this Court has said about a related principle of statutory construction: "this interpretive canon is not a license for the judiciary to rewrite language enacted by the legislature." [22]

The lower court's presumption of territoriality is largely the product of dicta in a few early decisions by this Court that have long since been superseded. One of the earliest and most direct statements of this presumption was in *American Banana Co. v. United Fruit Co.*, 213 U.S. 347, 356 (1909), where the Sherman Act was held inapplicable to the actions of a U.S. company in Central America because of "the general and almost universal rule . . . that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done." Similarly, in *Blackmer v. United States*, 284 U.S. 421, 437 (1932) (citing *American Banana*), the Court observed in passing that "the legislation of the Congress, unless the contrary intent appears, is construed to apply only within the territorial jurisdiction of the United States." And lastly, in *Foley Brothers, Inc. v. Filardo*, 336 U.S. 281, 295 (1949), this dicta was referred to as a "canon of construction which teaches that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States."

[21] *Weinberger v. Rossi*, 456 U.S. 25, 28 (1982) (quoting *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 221 (1952)).

[22] *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 493 n.11 (1985) (quoting *United States v. Albertini*, 472 U.S. 675, 680 (1985)). "Any other conclusion, while purporting to be an exercise in judicial restraint, would trench upon the legislative powers vested in Congress by Art. I, § 1, of the Constitution." *United States v. Albertini*, 472 U.S. 675, 680 (1985). *See also Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 672 (1986) (a presumption is controlling only "where substantial doubt about the congressional intent exists").

This presumption of territoriality was a common-sense generalization about Congress' likely intent that derived from two sources. First, under 18th and 19th century principles of public international law, the extraterritorial application of U.S. law "would be an interference with the authority of another sovereign, contrary to the comity of nations, which the other state concerned justly might resent." *American Banana*, 213 U.S. at 356.[23] As *American Banana* illustrates, the overwhelming weight of 19th century authority held that public international law erected strict territorial limits to national jurisdiction.[24]

Second, the presumption of territoriality was linked, in one decision, to Congress' likely lack of concern about events occurring abroad. The presumption was said to be based on "the assumption that Congress is primarily concerned with domestic conditions," *Foley Bros.*, 336 U.S. at 285, and that Congress would probably not have meant to deal with foreign or international conditions unless it said so explicitly.

Both of these bases of the territoriality presumption have lost their vitality. This century has witnessed a

[23] This Court's presumption of territoriality was one reflection of the general notion that Congress would not likely intend to violate rules of public international law. *See The Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804); *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 21-22 (1963).

[24] *Schooner Exchange v. M'Faddon*, 11 U.S. (7 Cranch) 116, 137 (1812); *The Apollon*, 22 U.S. (9 Wheat.) 361, 370 (1924); *Hilton v. Guyot*, 159 U.S. 113, 163-64 (1895), ("[n]o law has any effect, of its own force, beyond the limits of the sovereignty from which its authority is derived"). Similarly, in *Pennoyer v. Neff*, 95 U.S. 714, 722 (1878), this Court said that under international law "no State can exercise direct jurisdiction and authority over persons and property without its territory." The Court relied upon a number of international commentators for this conclusion, including J. Story, *Commentaries on the Conflict of Laws* § 539 (7th ed. 1872); H. Wheaton, *Elements of International Law* §§ 77, 111-14, 134-51 (1866). Like *American Banana*'s limits on legislative jurisdiction, *Pennoyer*'s rigid territorial limitations on judicial jurisdiction have long since been abandoned. *See International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

dramatic and exponential growth in transnational trade and international commercial interdependence.[25] As the Council of Economic Advisers recently observed, "[i]n today's highly integrated world economy, international economic policy issues are inseparably intertwined with domestic policy issues. International features arise naturally as one considers traditionally domestic issues such as fiscal policy, monetary policy, and environmental policy." [26]

As a result, the United States and other nations have increasingly taken great regulatory interest in conduct occurring abroad and have frequently extended their laws extraterritorially to such conduct. Thus, Congress has enacted scores of federal laws that deal with countless issues occurring partially or wholly outside of the United States.[27] Simply, put, the economic, social, and political

[25] *Compare* Bureau of the Census, U.S. Dep't of Commerce, *Statistical Abstract of the United States: 1947*, Table No. 992, at 887 (68th ed. 1947) (average annual U.S. exports and imports in 1936-40 of $3.2 billion and $2.5 billion) *with* Bureau of the Census, U.S. Dep't of Commerce, *Statistical Abstract of the United States: 1987*, Table No. 1401, at 789 (107th ed. 1986) (annual U.S. exports and imports in 1985 of $213 billion and $345 billion). *See Economic Report of the President* 7 (Feb. 1990) ("The 1980's have underscored the increased importance of global economic events in shaping our lives"); U.S. Dep't of Commerce, *United States Trade: Performance in 1988* 1-6 (1989) (emphasizing "growing international interdependence of nations").

[26] *The Annual Report of the Council of Economic Advisers* 264 (Feb. 1990).

[27] *E.g.*, Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1602-11; Foreign Trade Antitrust Improvements Act of 1982, 15 U.S.C. §§ 6a, 45(a)(3); Federal Reserve Act of 1913, 12 U.S.C. §§ 601-604a; Foreign Assistance Act of 1962 (The Hickenlooper Amendment), 22 U.S.C. § 2370(e); Foreign Corrupt Practices Act of 1977, 15 U.S.C. § 78dd-1(a). A 1989 compilation of U.S. international trade legislation is 898 pages long and includes hundreds of statutory provisions. Committee on Ways and Means, U.S. House of Representatives, *Overview and Compilation of U.S. Trade Statutes* (1989). Other nations have also increasingly applied their laws extraterritorially. *See* Restatement (Third) Foreign Relations Law, § 403, Reporters' Note 3 (1987).

interdependence of the 20th century world does not permit Congress to concern itself solely with "domestic conditions," and it no longer makes sense to assume that any such limitation is intended.

At the same time, principles of public international law have significantly evolved to accommodate these extraterritorial regulatory measures. A wide range of authorities attest to the abandonment of notions of strict territoriality. Thus, the Restatement (Third) Foreign Relations Law provides that jurisdiction may be based upon nationality, *id.* § 402(2), upon the "effects" or objective territoriality principle, *id.* § 402(1)(c), upon so-called "universal" offenses, *id.* § 404, or upon the protective principle, *id.* § 402(3). Indeed, the Third Restatement specifically describes the gradual erosion of strict public international law notions of territoriality:

> In the past, the jurisdiction of a state to make its law applicable in a transnational context was determined by formal criteria supposedly derived from concepts of state sovereignty and power. . . . Increasingly, the practice of states has reflected conceptions better adapted to the complexities of contemporary international intercourse. . . . Territoriality and nationality remain the principal bases of jurisdiction to prescribe, but in determining their meaning rigid concepts have been replaced by broader criteria.[28]

This Court's decisions illustrate both the degree to which Congress has concerned itself with conduct abroad

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[28] Restatement (Third) Foreign Relations Law, at 235-37 (1987). Other authorities describe the same process. *See* Lowenfeld, *Public Law in the International Arena: Conflict of Laws, International Law, and Some Suggestions for Their Interaction*, 163 Recueil des Cours 321 (1979); D. Rosenthal & B. Knighton, *National Laws and International Commerce* (1982); Akehurst, *Jurisdicton in International Law*, 46 Brit. Y.B. Int'l L. 145 (1974); Wallace, *Extraterritorial Jurisdiction*, 15 Law & Pol'y Int'l Bus. 1099 (1983). *Cf. Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 186 (1982) ("As corporate involvement in international trade expanded in this century, old commercial treaties became outmoded").

and the extent to which 18th century notions of strict territoriality have been abandoned. In enacting the antitrust laws, Congress used only general language that made no specific reference to conduct occurring abroad.[29] As we have seen, this Court held in 1909 that the general terms of the Sherman Act would be construed as being "confined in [their] operation and effect to the territorial limits over which the lawmaker has general and legitimate power." *American Banana*, 213 U.S. at 357. But this Court has since flatly overruled *American Banana*,[30] and it has repeatedly held that the antitrust laws *do* apply to conduct occurring wholly outside the United States.[31]

Like the antitrust laws, the Lanham Act contains broad jurisdictional language that does not make specific reference to conduct occurring abroad. Nonetheless, this Court held in *Steele v. Bulova Watch Co.*, 344 U.S. 280 (1952), that the Lanham Act applied extraterritorially to conduct by a U.S. national that had effects within the United States. The Court emphasized that "the United States is not debarred by any rule of international law from governing the conduct of its own citizens . . . in foreign countries

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[29] *See* 15 U.S.C. § 1 ("restraint of trade or commerce . . . with foreign nations"); 15 U.S.C. § 2 ("monopolize . . . commerce . . . with foreign nations").

[30] Justice Scalia just last Term characterized *American Banana* as having been "substantially overruled" by *Continental Ore. W.S. Kirkpatrick v. Environmental Tectonics Corp.*, 110 S. Ct. 701, 705 (1990).

[31] *See Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 705 (1962); *United States v. Sisal Sales Corp.*, 274 U.S. 268, 275-76 (1927). Likewise, this Court has repeatedly cited with approval the Second Circuit's seminal decision in *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945), holding that the Sherman Act applies to conduct aboard that has effects within the United States. *See Continental Ore Co. v. Union Carbide*, 370 U.S. 690, 704-05 (1962); *Steele v. Bulova Watch Co.*, 344 U.S. 280, 288 n.16 (1952); *Zenith Radio Corp. v. Hazeltine Research Corp.*, 395 U.S. 100, 114 n.8 (1969). *Accord* Restatement (Third) Foreign Relations Law § 415 (1987); U.S. Dep't of Justice, *Antitrust Enforcement Guidelines for International Operations* 29-34 (1988).

when the rights of other nations or their nationals are not infringed." *Id.* at 285-86.

Similarly, the pretrial discovery provisions of the Federal Rules of Civil Procedure do not specifically authorize discovery of documents or other materials located outside the United States. But this Court has held squarely that the Federal Rules do authorize extraterritorial discovery; indeed, even where U.S. discovery would require violating foreign secrecy or nondisclosure laws, discovery may be ordered.[32]

Likewise, the geographic scope of the federal securities laws are couched in general terms that Congress did not specifically extend to conduct occurring in foreign states.[33] Nonetheless, it is well-established that the securities laws are applicable extraterritorially to foreign conduct. Section 416 of the Restatement (Third) Foreign Relations Law specifically provides for such a result, and comment a to that section explains that "[t]he reach and application of securities legislation of the United States depend on their reasonableness," and not upon strict notions of territoriality.[34] And finally, numerous lower courts have ap-

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[32] *Societe Internationale Pour Participations Industrielles et Commerciales S.A. v. Rogers*, 357 U.S. 197 (1958); *Societe Nationale Industrielle Aerospatiale v. U.S. District Court*, 482 U.S. 522 (1987). *See* Restatement (Third) Foreign Relations Law § 442 (1987).

[33] 15 U.S.C. § 77b(7) ("The term 'interstate commerce' means trade or commerce in securities . . . among . . . or between any foreign country and any State, Territory, or the District of Columbia").

[34] Restatement (Third) Foreign Relations Law § 416, comment a (1977). Dozens of lower court decisions have applied the securities laws extraterritorially. *E.g., Tamari v. Bache & Co. (Lebanon)*, 730 F.2d 1103 (7th Cir.), *cert. denied*, 469 U.S. 871 (1984); *Psimenos v. E.F. Hutton & Co.*, 722 F.2d 1041 (2d Cir. 1983); *Zoelsch v. Arthur Andersen & Co.*, 824 F.2d 27 (D.C. Cir. 1987); *Grunenthal GmbH v. Hotz*, 712 F.2d 421, 425 (9th Cir. 1983).

plied generally worded federal narcotics and other criminal statutes extraterritorially.[35]

Based on these and other decisions, the recent Restatement (Third) Foreign Relations Law specifically *deleted* a section of the earlier Restatement (Second) Foreign Relations Law providing that federal statutes were presumed to be applicable only within U.S. territory. Section 38 of the Second Restatement provided that "[r]ules of United States statutory law . . . apply only to conduct occurring within, or having effect within, the territory of the United States, unless the contrary is clearly indicated by the statute." The Third Restatement omitted this section, recognizing that this Court's recent decisions, and the evolution of public international law rules, no longer support any such presumption.[36]

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[35] *E.g., United States v. Wright-Barker*, 784 F.2d 161 (3d Cir. 1986); *United States v. Baker*, 609 F.2d 134 (5th Cir. 1980); *United States v. Brown*, 549 F.2d 954 (4th Cir. 1977).

[36] Respondent has suggested that the Third Restatement preserves the territoriality presumption contained in § 38 of the Second Restatement. Cert. Opp. at 5 n.5. The overwhelming weight of the evidence is to the contrary. *See* Restatement (Third) Foreign Relations Law § 402, comment i (1987) ("statutes should, where fairly possible, be interpreted consistently with this section and § 403"); *id.* § 403, comment a.

This Court's decisions in *McCulloch* and *Benz* do not support the lower court's presumption of territoriality in cases involving U.S. parties. The issue in those cases was whether the U.S. statutes in question applied to *alien* workers. That issue is simply irrelevant here. As discussed above, the alien exclusion of Title VII distinguishes between citizen and alien labor, and makes plain that the Act does not protect aliens outside the United States. 42 U.S.C. 2000e-1. Where application of the NLRA to *U.S.* workers is involved, this Court has not followed *McCulloch* and *Benz*. *See Int'l Longshoremen's Assn., Local 1416 v. Ariadne Shipping Co.*, 397 U.S. 195 (1970); *State Bank of India v. NLRB*, 808 F.2d 526 (7th Cir. 1986), *cert. denied*, 483 U.S. 1005 (1987). Similarly, in *Foley Bros.* 336 U.S. at 286, the Court's rationale was premised in large part upon the fact that if the statute at issue were interpreted to apply outside the U.S., it (unlike Title VII) would have applied there to aliens as well as U.S. citizens.

B. Rather Than Applying Any Rigid Presumption of Territoriality, This Court Has Repeatedly Held That The Reach of Ambiguous Federal Statutes Is Determined by Reference to International Choice-of-Law Principles

Rather than reflecting an archaic presumption of strict territoriality, this Court's construction of the geographic scope of federal statutes has been based upon a more natural, common sense analysis. This Court has repeatedly concluded that Congress legislates against the background of public international law and choice-of-law rules. These rules have provided a flexible, finely-tuned basis for determining the geographic scope of federal statutes.[37]

In *Lauritzen v. Larsen*, 345 U.S. 571 (1953), this Court considered the geographic reach of the Jones Act's broad grant of relief to "[a]ny seaman who shall suffer personal injury in the course of his employment . . ." 46 U.S.C. App. § 688(a). The Court refused to apply either a strict territorial presumption or a blindly literal reading of this formula. Instead, the Court held that the Jones Act was passed against a background of maritime choice-of-law rules and international law principles that sought to "reconcil[e] our own with foreign interests and . . . accommodat[e] the reach of our own laws to those of other maritime nations." 345 U.S. at 577. And these choice-of-law rules called upon the Court to identify the "connecting factors between the shipping transaction regulated and the national interest served by the assertion of authority."[38] Applying these factors, the Court held that

[37] By contrast, respondent's rigid territoriality rule would have bizarre results. A U.S. employee, dispatched abroad on a short business trip, could be terminated on the basis of race or gender during his or her travels and Title VII would not apply. Congress simply could not have intended to permit this.

[38] 345 U.S. at 582. The court identified several "choice of law" considerations relevant to this analysis: the place of the wrongful act; the law of the flag; the allegiance or domicile of the injured; the allegiance of the defendant shipowner; the place of the contract; the inaccessibility of any foreign forum; and the law of the forum state. *Id.* at 583-93.

the Jones Act did not apply to a Danish seaman injured on board a Danish ship, while that ship was anchored in Havana, Cuba.[39]

Similarly, in *Steele v. Bulova Watch Co.*, 344 U.S. 280 (1952), the Court looked to a range of different considerations—identical to those factors relevant to choice-of-law analysis—in holding the Lanham Act applicable extraterritorially to unlawful conduct in Mexico. Among other things, the Court emphasized that the defendant was a U.S. national and resident, *id.* at 284-85; that the plaintiff was a U.S. corporation, *id.* at 281; that the allegedly unlawful conduct had some effects within the United States; *id.* at 286 and 288; and that no direct conflict between U.S. and Mexican law was presented, *id.* at 289. Based on similar choice-of-law analyses, subsequent lower court decisions involving allegedly unlawful conduct by *aliens* outside of the United States have generally been held beyond the reach of the Lanham Act.[40]

[39] Likewise, in *Romero v. Int'l Terminal Operating Co.*, 358 U.S. 354, 383 (1959), this Court again interpreted the Jones Act (and general maritime law) in light of "principles of choice-of-law." The Court held that the Jones Act provided no remedy for a foreign seaman, injured on a foreign vessel owned by a foreign national, even though the plaintiff's injury occurred in U.S. territorial waters: "The amount and type of recovery which a foreign seaman may receive from his foreign employer while sailing on a foreign ship should not depend on the wholly fortuitous circumstance of the place of injury." *Id.* at 384. The result in cases involving U.S. seamen or more extensive U.S. contacts is very different. *Hellenic Lines, Ltd. v. Rhoditis*, 398 U.S. 306 (1970) (applying *Lauritzen* analysis to find that Jones Act does provide remedy to alien seaman on foreign-flagged vessel with greater U.S. contacts); *Symonette Shipyards, Ltd. v. Clark*, 365 F.2d 464 (5th Cir. 1966) (Jones Act applies to U.S. seamen aboard foreign-flagged vessel on high seas); *Bartholomew v. Universe Tankships, Inc.*, 263 F.2d 437 (2d Cir. 1959).

[40] *Vanity Fair Mills, Inc. v. T. Eaton Co.*, 234 F.2d 633 (2d Cir.), *cert. denied*, 352 U.S. 871 (1956); *Vespa of America Corp. v. Bajaj*

This Court's recent decision in *Societe Nationale Industrielle Aerospatiale v. U.S. District Court*, 482 U.S. 522 (1987) is to the same effect. There, the Court adopted a comity-based choice-of-law analysis in order to determine when direct extraterritorial discovery under the Federal Rules of Civil Procedure would be ordered. This analysis required a "particularized analysis of the respective interests of the foreign nation and the requesting nation," together with other choice of law considerations. *Id.* at 543-44.

Finally, in *United States v. Aluminum Co. of America*, 148 F.2d 416, 443 (2d Cir. 1945), the Court of Appeals, sitting by Supreme Court certificate as the court of last resort, applied the same general choice-of-law analysis to the federal antitrust laws. The court held that it ought not "read general words, such as those in [the Sherman] Act, without regard to the limitations customarily observed by nations upon the exercise of their powers; limitations which generally correspond to those fixed by the 'conflict of laws.'" *Id.* at 443. This Court has specifically endorsed *Alcoa*,[41] and more recent lower court decisions have adopted an even more explicit choice-of-law approach to the extraterritorial effect of the antitrust laws.[42]

Auto Ltd, 550 F. Supp. 224, 227-28 (N.D. Cal. 1982). *See Wells Fargo & Co. v. Wells Fargo Express Co.*, 556 F.2d 406, 426-29 (9th Cir. 1977); *Ramirez & Feraud Chili Co. v. Las Palmas Food Co.*, 146 F. Supp. 594, 601-02 (S.D. Cal. 1956), *aff'd*, 245 F.2d 874 (9th Cir. 1957).

[41] *See* note 31 *supra*.

[42] *E.g., Timberlane Lumber Co. v. Bank of America N.T. & S.A.*, 549 F.2d 597 (9th Cir. 1976) *aff'd*, 749 F.2d 1378 (9th Cir. 1984), *cert. denied*, 472 U.S. 1032 (1985); *Montreal Trading Ltd. v. Amax Inc.*, 661 F.2d 864 (10th Cir. 1981), *cert. denied*, 455 U.S. 1001 (1982); *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287 (3rd Cir. 1979). *See also* U.S. Dep't of Justice *Antitrust Enforcement Guidelines for International Operations* 31-34 (1988).

Based upon these decisions, the Third Restatement replaced strict principles of territoriality with an analysis based upon choice-of-law principles and less archaic notions of public international law. As described above, § 402 of the Third Restatement recognizes a wide range of acceptable jurisdictional bases under international law—of which territoriality is only one. Section 403 then sets forth a "rule of reason" based upon choice-of-law considerations like those set forth in *Lauritzen*, *Bulova*, *Aerospatiale* and *Alcoa*: it provides that "a state may not exercise jurisdiction to prescribe law . . . when the exercise of such jurisdiction is unreasonable." And "reasonableness" is determined by evaluating a range of considerations, derived from this Court's decisions, that are set forth in § 403(2).[43]

III. UNDER INTERNATIONAL CHOICE-OF-LAW PRINCIPLES, TITLE VII APPLIES TO EMPLOYMENT DISCRIMINATION OUTSIDE THE UNITED STATES BY A U.S. COMPANY AGAINST A U.S. CITIZEN

Under the choice-of-law considerations set forth in this Court's decisions and § 403, it is plain that Title VII applies to respondents' conduct. First, respondents are Delaware corporations and U.S. nationals. Nationality—in and of itself—is well recognized as a legitimate basis for the assertion of extraterritorial jurisdiction.[44] And,

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[43] These considerations include the expectations and nationality of the parties subject to regulation; the domestic effects of the activity in question; the importance of the regulation to the regulating state; the degree of international consensus on the norms reflected in the regulation; and possible conflicts with the laws of other states. *See* Restatement (Third) Foreign Relations Law § 403(2) (1987).

[44] *See Skiriotes v. Florida*, 313 U.S. 69, 74 (1941) ("the United States is not debarred by any rule of international law from governing the conduct of its citizens upon the high seas or even in foreign countries when the rights of other nations or their na-

as we have already shown, this Court has repeatedly relied upon the defendant's U.S. nationality in determining the reach of U.S. statutes in international cases.[45]

This case also involves the application of U.S. law to protect a U.S. national from unlawful employment discrimination. This Court has often recognized the legitimate interest of states in the protection of their citizens,[46] and well-established choice-of-law principles give substantial weight to the nationality of the injured plaintiff.[47] This factor becomes even more compelling when the defendant is of the same nationality as the plaintiff, which is the case here.[48]

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tionals are not infringed"); *Blackmer v. United States*, 284 U.S. 421, 437 (1932); *Cook v. Tait*, 265 U.S. 47, 56 (1924).

Scores of federal laws apply specifically to the conduct of U.S. nationals, both at home and abroad. In general, federal laws apply extraterritorially to U.S. nationals when they concern matters of vital national importance—like racial discrimination. *E.g.*, 50 U.S.C. App. § 451 (1988) (selective service); *Cook v. Tait*, 265 U.S. 47 (1924) (taxation); *United States v. Bowman*, 260 U.S. 94 (1922) (fraud against United States); Foreign Corrupt Practices Act, 15 U.S.C. §§ 78dd (corrupt business practices). Moreover, given that U.S. nationals working abroad are subject to these U.S. legal obligations, it is only natural that Congress would have intended that they enjoy certain basic U.S. legal protections.

[45] *Lauritzen*, 346 U.S. at 587; *Bulova*, 344 U.S. at 285-86; *Bowman*, 260 U.S. at 102.

[46] *Compare McGee v. International Life Ins. Co.*, 355 U.S. 220, 223 (1957) (California has a "manifest interest in providing effective means of redress for its residents" against out-of-state defendant) *with Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 114 (1987) ("Because the plaintiff is not a California resident, California's legitimate interests in the dispute have considerably diminished").

[47] *See Lauritzen*, 345 U.S. at 586 (assigning substantial weight to "allegiance or domicile of the injured"); Restatement (Third) Foreign Relations Law § 403(2)(b) (1987); Restatement (Second) Conflict of Laws § 145 (1971).

[48] *See* Restatement (Second) Conflict of Laws § 145, comment e illustration 1; *Babcock v. Jackson*, 12 N.Y.2d 473, 240 N.Y.S.2d 743 (1963) (New York law applicable to accident in Canada involving two New York citizens).

Moreover, discrimination against U.S. citizens abroad by U.S. employers will have significant effects at home. More than two million U.S. citizens work outside of the United States, and many times this number travel abroad on business.[49] Successful performance in overseas assignments is often essential to career development at major firms. U.S. employees who are denied this path to advancement because of employment discrimination will be foreclosed, right here in the United States, from rising to positions of responsibility.[50] More fundamentally, violations of Title VII simply cannot be measured in the way that we calculate the effects of unfair trade practices. Civil rights are not commodities. When a U.S. company can tell a U.S. citizen abroad that he or she has been fired just because he is black or she is a woman, the moral imperative of Title VII is compromised. Tolerating such conduct conveys an insidious message to other Americans in the company (here and abroad) and to foreigners.

Of equal significance under this Court's international precedents is the importance that Congress attached to a particular statutory protection.[51] As we have already

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[49] *The World Almanac and Book of Facts: 1990* 555 (1989). *See* n.25 *supra*.

[50] Moreover, when a U.S. citizen is fired from an overseas position with a U.S. company he or she can ordinarily be expected to return to this country—and its unemployment compensation system. For the same reason, it is only natural that U.S. employees will seek legal recourse against Title VII violations abroad after they return to the United States. Maintaining an action abroad would require dealing from afar with foreign counsel, foreign procedures, laws and tribunals, and perhaps a foreign language—in a proceeding against a fellow American.

[51] *Societe Internationale*, 357 U.S. at 204-06; *Societe Nationale*, 482 U.S. at 540-41. Section 403(2)(c) of the Third Restatement also makes clear that substantial weight is to be accorded to the importance Congress has attached to particular law or public policy.

shown, Title VII embodies a national commitment of the most elemental and paramount importance. Moreover, the norms of Title VII are not only American values: they reflect the highest aspirations of the international community.[52] Discrimination on the basis of race or religion in employment is prohibited by international convention,[53] and as respondents concede, it is proscribed by the domestic laws of many countries.

Finally, this case does not involve any conflict between U.S. foreign laws or policies. As respondents concede, Saudi law—like Title VII—forbids employment discrimination.[54] Moreover, because Title VII only applies to discrimination against U.S. nationals, the likelihood of conflict with the laws of other nations is significantly diminished (precisely as Congress intended).[55]

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[52] Section 403(2)(e) and (f) of the Third Restatement demonstrate that the universal importance and acceptance of Title VII's basic precepts weighs in favor of extraterritorial application of the statute.

[53] *See, e.g.*, Convention on the Elimination of All Forms of Racial Discrimination, G.A. Res. 2106, 20 U.N. GAOR Supp. (No. 14) at 47, U.N. Doc. A/4354 (1965); Convention on the Elimination of All Forms of Discrimination Against Women, art. 11(1)(b), (c), G.A. Res. 34/180, 34 U.N. GAOR Supp. (No. 46) at 195, U.N. Doc. A/34/46 (1979); Convention Concerning Discrimination in Respect of Employment and Occupation, June 25, 1958, 362 U.N.T.S. 31.

[54] *Lauritzen*, 345 U.S. at 575, 582 (emphasizing significance of actual conflict between U.S. and foreign law); *Bulova*, 344 U.S. at 289. Respondents suggest that the existence of Saudi antidiscrimination laws itself creates a conflict with U.S. law. This confuses the existence of a *conflict* in national laws with the existence of *concurrent jurisdiction* by two nations over the same conduct. Concurrent jurisdiction is relatively common in the international legal system, by virtue of the increasingly normal practice of extraterriorial regulation. *See* Restatement (Third) Foreign Relations Law § 403, comment d (1987); *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 922 (D.C. Cir 1984).

[55] *United States v. Bowman*, 260 U.S. at 102; *Timberlane*, 549 F.2d at 612 ("applying American laws to American citizens raises fewer problems than application to foreigners").

There could, of course, be future cases in which a direct conflict between Title VII and a foreign law might exist. Foreign law might, for example, prohibit employing certain classes of persons in specific jobs, or it might encourage or require U.S. companies to hire certain categories of persons (*e.g.*, local nationals).[56] If and when cases involving legitimate conflicts arise, the Court will have the opportunity to determine how they should be resolved. We note here only that there are ample means for deciding such conflicts in a far more measured and precise way than simply declaring Title VII inapplicable to U.S. citizens whenever they go abroad. Some foreign laws might, in appropriate cases, provide the basis for a "bona fide occupational qualification," although the Lawyers' Committee believes that this defense should be applied sparingly. As described above, this Court and the lower courts have also properly considered the degree of conflict between U.S. and foreign laws in determining the extraterritorial reach of various federal statutes.[57] And in some cases, the Act of State doctrine or principles of foreign sovereign compulsion might be relevant.[58] But resolution of these issues should await concrete, live disputes where they may receive the "particularized analysis" that this Court has required in comparable matters.[59]

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[56] *Compare Kern v. Dynalectron Corp.*, 577 F. Supp. 1196 (N.D. Tex. 1983), *aff'd*, 746 F.2d 810 (5th Cir. 1984) (Saudi law prohibited non-Muslims from entering the holy area of Mecca) *with Fernandez v. Wynn Oil Co.*, 653 F.2d 1273 (9th Cir. 1981).

[57] *See* pp. 22-25 *supra*.

[58] *Compare Societe International Pour Participations Industrielles et Commerciales S.A. v. Rogers*, 357 U.S. 197 (1958) (U.S. court may order discovery of materials located in Switzerland under U.S. law notwithstanding the fact that Swiss law criminally punishes disclosure of material) *with Interamerican Refining Corp. v. Texaco Maracaibo, Inc.*, 307 F. Supp. 1291 (D. Del. 1970) (U.S. antitrust laws not applicable to conduct in Venezuela that was compelled by Venezuelan law).

[59] *Societe Nationale Industrielle Aerospatiale v. U.S. District Court*, 482 U.S. 522, 543 (1987).

CONCLUSION

For these reasons, the judgment of the court below should be reversed.

Respectfully submitted,

GARY B. BORN
Counsel of Record
W. HARDY CALLCOTT
MICHAEL C. SMALL
ELIZABETH KIINGI
WILMER, CUTLER & PICKERING
2445 M Street, N.W.
Washington, D.C. 20037
(202) 663-6000

ROBERT F. MULLEN
Co-Chairman
DAVID S. TATEL
Co-Chairman
NORMAN REDLICH
Trustee
BARBARA R. ARNWINE
THOMAS J. HENDERSON
RICHARD T. SEYMOUR
Lawyers' Committee for Civil
Rights Under Law
1400 Eye Street, N.W.
Washington, D.C. 20005
(202) 371-1212

Dated: November 15, 1990

Nos. 89-1838 & 89-1845

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Petitioner,

—v.—

ARABIAN AMERICAN OIL COMPANY, *et al.*,

Respondents.

ALI BOURESLAN,

Petitioner,

—v.—

ARABIAN AMERICAN OIL COMPANY and ARAMCO SERVICES COMPANY,

Respondents.

ON WRITS OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION, THE WOMEN'S LAW FUND, INC., THE INTERNATIONAL LABOR RIGHTS EDUCATION AND RESEARCH FUND, CAROLE D. AKGUN, AND GLORIA CONTRERAS IN SUPPORT OF PETITIONERS

Jane M. Picker
(*Counsel of Record*)
Kenneth J. Kowalski
Cleveland-Marshall College of Law
1801 Euclid Avenue
Cleveland, Ohio 44115
(216) 687-3947

Isabelle Katz Pinzler
John A. Powell
American Civil Liberties Union Foundation
132 West 43 Street
New York, New York 10036
(212) 944-9800

Sidney Picker, Jr.
Case Western Reserve University Law School
11075 East Boulevard
Cleveland, Ohio 44106
(216) 268-3294

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE OF THE AMERICAN CIVIL LIBERTIES UNION, THE WOMEN'S LAW FUND, INC., THE INTERNATIONAL LABOR RIGHTS EDUCATION AND RESEARCH FUND, CAROLE D. AKGUN, AND GLORIA CONTRERAS IN SUPPORT OF PETITIONERS

The American Civil Liberties Union, the Women's Law Fund, Inc., the International Labor Rights Education and Research Fund, Carole D. Akgun, and Gloria Contreras hereby move for leave to file the annexed brief amici curiae pursuant to Rule 37.4 of the Rules of this Court. Counsel for both petitioners have consented to the filing of this brief. Counsel for respondents has refused to consent to the inclusion of Carole D. Akgun and Gloria Contreras as amici.

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with over 275,000 members dedicated to the preserving and enhancing the fundamental civil rights and civil liberties embodied in the Constitution and civil rights laws of this country. In particular, the ACLU has long been involved in the effort to eliminate racial discrimination in our

society. The Women's Rights Project of the ACLU Foundation was established to work toward the elimination of gender-based discrimination in our society. In pursuit of that goal, the ACLU has participated in numerous discrimination cases before this Court.

The Women's Law Fund, Inc., is a nonprofit corporation with the sole purpose of "bring[ing] women into full participation in all activities of American life by securing them their full legal rights under the Constitution and laws of the United States." The Fund is particularly concerned with the problem of achieving equal employment opportunity for women and, through its funding of litigation, Women's Law Fund, Inc. seeks to assist all persons who are discriminated against because of their sex through illegal employment practices.

The International Labor Rights Education and Research Fund (ILRERF) is a nonprofit corporation organized to promote the interests of workers on an international scale to offset the effects of the global economy on worker rights. The global economy has created greater freedom for companies to relocate manu-

facturing facilities in countries without protections for working men and women resulting in a downward spiral of worker rights. The ILRERF is made up of leaders from the human rights, labor, religious and academic communities, who either on behalf of their organizations or as individuals, have an interest in working to achieve the goal of decent and humane treatment for all workers. The application of Title VII of the Civil Rights Act of 1964 to American employees of American firms operating outside of the United States is of vital concern to the ILRERF's interest in preventing situations in which American firms can avoid their legal and moral obligations to their workers by relocating to a country that does not have equivalent protection for workers.

Carole D. Akgun and Gloria Contreras are U.S. citizens and plaintiffs in Akgun v. Boeing Company, 53 E.P.D. (CCH) §40,011 (W.D. Wash. 1990). They allege that they were discriminated against on the basis of their sex when Boeing Services International, a company incorporated under the laws of the State of Delaware, terminated their employment in Turkey. Their ability to

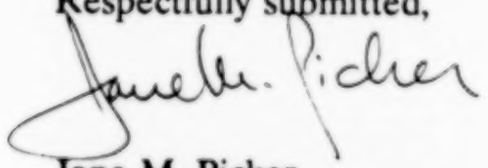
pursue their legal remedies under Title VII will be directly affected by the outcome of this case. Ms. Akgun and Ms. Contreras are not here arguing the merits of their individual claims but rather join the organizational amici herein in presenting to the Court the important questions of international law which may not be addressed by the parties or other amici.

This case involves the vitally important question of whether Title VII of the Civil Rights Act of 1964 will be construed to apply extraterritorially to the acts of American employers which discriminate against their U.S. citizen employees abroad. As more fully set forth in the Introduction to the annexed brief amici curiae, such practices effect thousands of American citizens working for American companies operating overseas. It is the primary concern of these amici to address the implication of international law principles with respect to statutory interpretation of Title VII's extraterritorial reach.

Because we believe that the decision below was erroneous, we respectfully move to leave to file the

attached brief amici curiae in order to present the Court with our views in this important case.

Respectfully submitted,



Jane M. Picker
(Counsel of Record)
Kenneth J. Kowalski
Cleveland-Marshall College
of Law
1801 Euclid Avenue
Cleveland, Ohio 44115
(216) 687-3947

Sidney Picker, Jr.
Case Western Reserve
University Law School
11075 East Boulevard
Cleveland, Ohio 44106
(216) 268-3294

Isabelle Katz Pinzler
John A. Powell
American Civil Liberties
Union Foundation
132 West 43 Street
New York, New York 10036
(212) 944-9800

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TABLE OF CONTENTS

Page

INTEREST OF AMICI 1

SUMMARY OF ARGUMENT 1

ARGUMENT 6

Introduction 6

I. Congressional Intent Must Be Interpreted in Light of Settled Principles of International Law 12

A. International Law Is Not Violated When Title VII Is Applied To U.S. Employers Abroad 15

1. Territorial Jurisdiction 16

2. Nationality Jurisdiction 19

B. It Is Not Likely That Congress Intended Title VII To Apply To Alien Employers of Americans Abroad Since To Do So Would Have Violated Then Perceived Notions of International Law 23

1. Jurisdiction over Aliens for Acts Committed Abroad 24

Page

2. Principles of International Law and Administrative and Court Interpretation Favor Restrictive Application of Title VII to Employers Overseas 28

C. Concurrent Jurisdiction, Conflicting Regulation, and Balancing 31

II. The Fifth Circuit Required Too Explicit a Statement of Congressional Intent 37

B. Foley's Determination That Labor and Industrial Relations Are Primarily of Domestic Concern Should Not Characterize the Antidiscrimination Laws Today 40

C. Foley's "Clearly Expressed Purpose" Standard Should Be Reserved For Legislation in Violation of International Law 43

D. Interpreting Title VII to Apply to U.S. Employers Employing Americans Abroad Involves No Violation of International Law, and Congressional Intent Need Not Be Explicitly Stated 46

III. No Special Venue or EEOC Investigatory Problems Arise in Applying Title VII Extra-territorially to American Employers 49

CONCLUSION 53

TABLE OF AUTHORITIES

Cases Page

Akgun v. Boeing, 53 Emp. Prac. Dec. (CCH) ¶40,011 (W.D. Wash. 1990) 10

Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964) 13

Benz v. Compania Naviera Hidalgo S.A., 353 U.S. 138 (1954) 36

Blackmer v. United States, 284 U.S. 421 (1932) 50

Bryant v. International School Servs., Inc., 502 F.Supp. 472 (D. N.J. 1980), rev'd on other grounds, 675 F.2d 562 (3d Cir. 1982) 9, 42

EEOC v. Bermuda Star Line, 744 F.Supp. 1109 (M.D. Fla. 1990) 11

EEOC v. Institute of Gas Technology, 24 Empl. Prac. Dec. (CCH) 31,198 (N.D. Ill. 1980) 52

EEOC v. Kloster Cruise Limited, 743 F. Supp. 856 (S.D. Fla. 1990) 11

F.T.C. v. Compagnie de Saint-Gobin-Pont-A-Mousson, 636 F.2d 1300 (D.C. Cir. 1980) 13

Page

Foley Bros. v. Filardo,
336 U.S. 281 (1949) 3

Hellenic Lines Ltd. v. Rhoditis,
398 U.S. 306 (1970) 35

Hilton v. Guyot,
159 U.S. 113 (1895) 36

Laker Airlines v. Sabena
Belgian World Airlines,
731 F.2d 909 (D.C.Cir. 1984) 33

Lauritzen v. Larsen,
345 U.S. 571 (1953) 35

Lavrov v. NCR Corp.
600 F.Supp. 923 (S.D. Ohio 1984) 9, 23

Lavrov v. NCR,
600 F.Supp. 923, 932 (S.D. Ohio 30

McCulloch v. Sociedad Nacional
de Marineros de Honduras,
372 U.S. 10 (1963) 36

Murray v. The Charming Betsy,
2 Cranch 64 (1804) 14

Paquete Habana,
175 U.S. 677 (1900) 13

Psimenos v. E.F. Hutton,
722 F.2d 1041 (2d Cir. 1983) 44

Page

Romero v. Int. Terminal Operating Co.,
358 U.S. 354 (1958) 35

S.S. Lotus (France v. Turkey),
1927 P.C.I.J. (ser. A) No. 10 ..... 26, 31

Sandberg v. McDonald,
248 U.S. 185 (1918) 36

Skiriotes v. Florida,
313 U.S. 69 (1940) 44

Societe Nationale Industrielle Aerospatiale
v. United States Dist. Ct.,
482 U.S. 522 (1987) 36

Spiess v. C. Itoh & Co. (America), Inc.,
643 F.2d 353 (5th Cir. 1981) 25

Steele v. Bulova Watch Co.,
344 U.S. 280 (1952) 44

Stegeman v. United States,
425 F.2d 984 (9th Cir.) (en banc),
cert denied, 400 U.S. 837 (1970)), cert. denied. 109 S.Ct.
1342 (1989) 20

Tamari v. Bache & Co.,
730 F.2d 1103 (7th Cir. 1984) 44

The Paquete Habana,
175 U.S. 677 (1900) 13

United States v. Aluminum Co. of America,
148 F.2d 416 (2d Cir. 1945) 18

United States v. Baker,
609 F.2d 134 (5th Cir. 1980) 21

United States v. Bennett,
232 U.S. 299 (1914) 21

United States v. Bowman,
260 U.S. 94 (1922) 43

United States v. Layton,
855 F.2d 1388 (9th Cir. 1988),
cert. denied, 109 S.Ct. 1342 (1989) 20, 21, 43

United States v. Yunis,
681 F.Supp. 896 (D.D.C. 1988) 45

United States v. Zehe,
601 F.Supp. 196 (D. Mass 1985) 21

Vermilya-Brown v. Connell,
335 U.S. 377 (1949) ..... passim

Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658 (1979) 44

Weinberger v. Rossi,
456 U.S. 25 (1982) 14, 44

Statutes, Rules and Legislative Material

22 U.S.C. §5032 22

22 U.S.C. §5037 22

29 U.S.C. § 623(h) (Supp. 1989) 23

29 U.S.C. §623(f)(1)(1984) 23

42 U.S.C. §2000e-(f)(3) 50

50 U.S.C. App. §2407 42

50 U.S.C. App. §2407(a)(1) 22

Act of July 3, 1926, 28 U.S.C. §§711-718 50

Age Discrimination in Employment Act,
29 U.S.C. §621 (1967) ..... passim

Civil Rights Hearing on H.R. 7152 Before the House Comm. on the Judiciary, 88th Cong. 1st Sess. (1963) 33

Commodities Exchange Act 7 U.S.C. §6c 44

Comprehensive Anti-Apartheid Act of 1986, 22 U.S.C. §§5032, 5034 and 5035 (Supp. 1989) 22, 42

Destruction of Aircraft or Aircraft Facilities Act,
18 U.S.C. §32(a) 45

Page

Eight Hour Law, 40 U.S.C. §324
(repealed 1962) 37, 38, 41, 47

Fair Labor Standards Act of 1938,
29 U.S.C. §201 ..... 39, 46

Rule 4(i) of the Federal Rules
of Civil Procedure 50

Statute of the International Court
of Justice, art. 38, 1983 U.N.Y.B. 1334 33

Title VII of the Civil Rights Act
of 1964, 42 U.S.C. §2000e et seq. ..... passim

Publications

"EEOC: Policy Statement on Application
of Title VII to American Companies
Overseas and to Foreign Companies,"
Lab. Rel. Rep. (BNA) No. 610,
AT 401:6063 (Sept. 2, 1988) 30

1 World Trade Academy Press,
Directory of American Firms
Operating in Foreign Countries
(10th ed. 1984) 6

Convention Concerning Discrimination
in Respect of Employment and
Occupation, No. 111, adopted
June 25, 1958, 362 U.N.T.S. 32 11

Page

Department of Defense,
Worldwide Manpower Distribution
by Geographic Area,
June 30, 1989, Table P309C,
U.S. Citizen Civilian Employees -
Dependent Strength. 7

EEOC Policy Statement on Application
of Title VII to American Companies
Overseas and to Foreign Companies,
Lab. Rel. Rep. (BNA)
No. 610 (Sept. 2, 1988) 30

Gallozzi, "International Decisions,"
83 Am.J. Int'l 375 (1989) 2

Gann, "Foreward: Issues in
Extraterritoriality,"
50 Law & Contemp. Probs. 1 (1987) 24

Gerth, "2 U.S. Workers for Aramco
Say Interviews Caused Their Dismissal,"
N.Y Times, Nov. 21, 1983 ..... 6, 8

International Convention on the
Elimination of all Forms of
Racial Discrimination,
660 U.N.T.S. 195 (Mar. 7, 1966) 11

Lowe, "Blocking Extraterritorial
Jurisdictions: The British Protection
of Trading Interests Act, 1980,"
75 Am. J. Int'l L. 257 (1981) 23, 36

Lowenfeld, "U.S. Law Enforcement Abroad: The Constitution and International Law," 83 Am. J. Int'l 880 (1989) 28

Maier, "Extraterritorial Jurisdiction at a Crossroads: An Intersection Between Public and Private International Law," 76 Am. J. Int'l L. 280 (1982) 16, 36

Maier, Book Review, 83 Am. J. Int'l L. 676 (1989) (reviewing The Extraterritorial Application of National Laws (Lange & Brown ed. 1987) 16

Meessen, "Conflicts of Jurisdiction Under the New Restatement," 50 Law and Cont.Prob. 47 (1967) 34

Note, "Constructing the State Extraterritorial: Jurisdictional Discourse, the National Interest, and Transnational Norms," 103 Harv. L. Rev. 1273 (1990) 19

Restatement (Third) of Foreign Relations Law of the United States (1986) .... passim

Schauer, "Slippery Slopes," 99 Harv. L. Rev. 361 (1985) 31

Shannor, Extraterritorial Application of Title VII of the Civil Rights Act, PROCEEDINGS OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW, (March 31, 1990) 8

Small, Managing Extraterritorial Jurisdiction Problems: The United States Government Approach, 50 Law & Contemp. Probs. 283 (1987) 16, 18

Statute of the International Court of Justice, 1983 Yearbook of the United Nations 1334 (entered into force for the U.S. on Oct 24, 1945) 12

Steiner & Vagts, Transnational Legal Problems 245 (3d ed. 1986) 20

Steinhardt, The Role of International Law as a Canon of Domestic Statutory Construction, 43 Van.L.Rev. 1103 (1990) 17

Street, "International Commercial and Labor Migration Requirements as a Bar to Discriminatory Employment Practices," 31 How. L.J. 497 (1988) 53

Street, Application of U.S. Fair Employment Laws to Transnational Employers in the United States and Abroad, 19 N.Y.U. J. Int'l L. & Pol. 357 (1987) 6

Turley, "Transnational Discrimination and the Economies of Extra-territorial Regulation," 70 B.U.L. Rev. 339 (1990). 7, 19

Turley, "When in Rome: Multi-national Misconduct and the Presumption Against Extraterritoriality," 84 Nw. U.L. Rev. 598 (1990) 17, 19

Miscellaneous

Convention on the Elimination of all Forms of Discrimination Against Women, opened for signature March 1, 1980, G.A. Res. 34/180, 34 U.N. GAOR Supp. (No. 46), U.N. Doc. A/34/36 (Dec. 18, 1979), reprinted in 19 I.L.M. 33 (1980) 11

The Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, 20 U.S.T. 361; T.I.A.S. 6638; 658 U.N.T.S. 163 (1969) 51

INTEREST OF AMICI

The interest of amici are set forth in the motion attached to this brief.

SUMMARY OF ARGUMENT

The United States Court of Appeals for the Fifth Circuit, first sitting as a panel, and later, en banc, ruled that Congress did not intend Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e et seq. to protect American citizens employed by American employers overseas. Boureslan v. Aramco, 892 F.2d 1271 (5th Cir. 1990) (en banc). It is the primary concern of these amici curiae to address the implications of international law principles with respect to statutory interpretation of Title VII's extraterritorial reach. Amici herein argue that by failing to employ appropriate principles of statutory construction, including the presumption that Congress does not intend to violate international law, the ruling of the court of appeals was fundamentally flawed.

An assessment of the panel's ruling by one commentator stated:

> The decision turns on principles of statutory construction. From that perspective, it stands to reason that questions regarding the extraterritorial application of a statute -- which are, at bottom, questions regarding the relationship between the United States and other sovereign nations -- cannot be resolved without reference to jurisdictional principles of international law.[1]

The court's en banc decision no more considered jurisdictional principles of international law in interpreting congressional intent than did the panel. Applying jurisdictional principles of international law to statutory analysis can help determine whether applying Title VII of the Civil Rights Act extraterritorially would violate international law. As amici argue, the interpretation of Title VII to protect Americans employed by American employers overseas is consistent

[1] Gallozzi, "International Decisions," 83 Am.J. Int'l L. 375, 380 (1989) (reviewing Boureslan v. Aramco, 857 F.2d, 1014; 863 F. 2d 8 (5th Cir. 1988).

with international law's well-accepted principle of nationality jurisdiction.

However, the Fifth Circuit's en banc ruling appears to have been influenced by consideration of a far more troublesome question than the issue before it, namely, whether Title VII would then also necessarily apply to alien employers employing American citizens abroad. To apply Title VII to alien employers abroad could have been perceived to be a violation of international law at the time of Title VII's enactment.

Believing that interpreting Title VII to apply to American employers abroad would also require foreigners employing Americans overseas to be subject to Title VII, the Fifth Circuit required an express statement of congressional intent. Use of the "clearly expressed purpose" standard, enunciated earlier in Foley Bros. v. Filardo, 336 U.S. 281 (1949), is more appropriately reserved for those portions of legislation which Congress

believes are not in compliance with international law. However, the scope, object, and purpose of Title VII as well as its definitions, and §702 of the Act, which exempts aliens working abroad from Title VII's protection, constitute a clear expression from which to infer Congress' intent to apply Title VII to protect Americans employed by American employers overseas. Such application is wholly consistent with the nationality principle of prescriptive jurisdiction in international law. Whether or not Congress at a maximum also may have intended that Title VII apply to aliens is most unlikely. But the facts of this case do not raise that question.

As other briefs in support of petitioner presented to this Court will agree, court decisions, legislative history, and administrative interpretations all support the extraterritorial application of Title VII to protect Americans employed by American employers abroad. All judicial decisions prior to the court of appeals' ruling

in Boureslan had interpreted the alien exemption language of §702 to apply Title VII to American employees of American employers overseas.

The Age Discrimination in Employment Act, 29 U.S.C. §621 (hereinafter ADEA), which contained no language similar to §702 from which extraterritorial application could be inferred, was amended in 1984 to provide coverage to Americans employed by American companies overseas. Other briefs will present the legislative history of the ADEA which indicates that it was amended to bring it into conformity with Title VII's congressionally perceived extraterritorial reach.

Finally, as these amici argue, interpreting Title VII to apply extraterritorially would create no special venue or investigatory problems. Various methods of taking discovery abroad are routinely used and create no problems under international law, particularly where discovery is taken of U.S. citizens. Indeed, when

Congress amended the ADEA it did not consider it necessary to provide special venue or investigatory provisions to assist the Equal Employment Opportunity Commission (hereinafter EEOC) in its enforcement of that legislation.

ARGUMENT

Introduction

While the exact number of Americans working for American employers overseas is not known, some information is available. Over 2,000 U.S. firms operate more than 21,000 foreign subsidiaries in at least 121 foreign nations.[2] Sixty-five thousand Americans were reported to be working in Saudi Arabia in 1983.[3] And approximately 28,000 civilian Americans are employed at

[2] Street, Application of U.S. Fair Employment Laws to Transnational Employers in the United States and Abroad, 19 N.Y.U. J. Int'l L. & Pol. 357, 358 (1987) (citing Introduction to 1 World Trade Academy Press, Directory of American Firms Operating in Foreign Countries (10th ed. 1984)).

[3] Gerth, "2 U.S. Workers for Aramco Say Interviews Caused Their Dismissal," N.Y Times, Nov. 21, 1983, at 5, col. 3.

defense bases around the world.[4] One author has concluded: "Today, U.S. citizens abroad likely number in the millions."[5]

These numbers indicate that a significant number of Americans will be without protection if Title VII is interpreted not to apply to American employers overseas. Yet every indication suggests that discrimination is even more of a problem for Americans abroad than it is at home.

Practices described in litigation and in news reports suggest that, while discrimination in the United States may have become increasingly subtle, American employees encounter outright intentional discrimination when they work for American employers abroad. While a New York Times account of the dismissal of two

[4] Department of Defense, Worldwide Manpower Distribution by Geographic Area, June 30, 1989, at 78-82, Table P309C, U.S. Citizen Civilian Employees - Dependent Strength.

[5] Turley, "Transnational Discrimination and the Economics of Extraterritorial Regulation," 70 B.U.L. Rev. 339, 389-90 n. 289 (1990).

American Aramco employees focused on two male employees, a lawyer and a petroleum engineer, the article mentioned that the wife of one of them had also been dismissed "in the aftermath of her husband's dismissal." The article continued: "As a matter of Aramco policy, which grows out of Saudi custom, women whose husbands are no longer employed are normally forced to leave their own jobs."[6]

In class action litigation filed in Texas, it was alleged that Aramco discharged 2,200 of its overseas U.S. employees between 1984 and 1987, in violation of Title VII and the ADEA.[7] As of January 23, 1989, fifty charges of unlawful discrimination filed by Americans against their American employers abroad were pending

[6] Gerth, supra note 3.

[7] Shannor, Extraterritorial Application of Title VII of the Civil Rights Act, PROCEEDINGS OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW (March 31, 1990). (Publication forthcoming. A tape recording of Mr. Shannor's remarks is on file with the counsel for amici, Jane M. Picker).

in the EEOC's administrative process. Of these, twenty-eight were filed in the EEOC's Houston, Texas office, most of which were charges against Aramco.[8]

Yet Aramco need not be singled out. In another case, benefits were denied American female teachers in Iran because they were considered not to "need" them; they were expected to be covered by their husbands' benefits. One of the plaintiffs, however, was divorced and therefore did not receive benefits from any source. Bryant v. International School Servs., Inc., 502 F.Supp. 472, 476 (D. N.J. 1980), rev'd on other grounds, 675 F.2d 562 (3d Cir. 1982). In Lavrov v. NCR Corp. 600 F. Supp. 923 (S.D. Ohio 1984), the plaintiff's allegation was based upon a letter from NCR's wholly owned German subsidiary stating, "[w]ith all due respect for the equal rights principle, I do not think that any of our present vacancies would be suitable for a girl." Complaint,

[8] Id.

Attachment 2, (No. C-3-82-272).

Cases decided subsequent to the en banc ruling in Boureslan continue to show disparate treatment of American employees. In Akgun v. Boeing Company, two American female plaintiffs were terminated from their jobs by Boeing Services International (BSI) because they were considered (based upon their husbands' status) to be 'ordinarily resident' in Turkey, and therefore not entitled to the benefits of the NATO Status of Forces Agreement. The court stated that: "BSI concedes that similarly situated men, married to Turkish women, would not be considered "ordinarily resident" in Turkey and would have therefore remained members of the civilian component." 53 Emp. Prac. Dec. (CCH) ¶40,011 at 62,912 (W.D. Wash. 1990). Decisions relating to the practices of cruise liners sailing from American ports provide evidence that women are denied jobs as seamen by some employers, EEOC v. Bermuda Star Line, 744

F.Supp. 1109, (M.D. Fla. 1990), while allegations suggest that others discharge female employees when they become pregnant. EEOC v. Kloster Cruise Limited, 743 F. Supp. 856 (S.D. Fla. 1990).

With the continuing globalization of U.S. trade, American employees of American companies can expect increased travel abroad. If regulation of labor matters was once left unquestioningly to local regulation, a number of post-World War II treaties now have as their purpose the elimination of racial, religious, national origin, and gender discrimination in the workplace.[9] Such conventions attest that discriminatory practices today are a matter of worldwide rather than local concern, appropriately regulated by the international

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[9] With respect to employment discrimination, see Convention on the Elimination of all Forms of Discrimination Against Women, opened for signature March 1, 1980, G.A. Res. 34/180, 34 U.N. GAOR Supp. (No. 46), U.N. Doc. A/34/36 (Dec. 18, 1979), reprinted in 19 I.L.M. 33 (1980); International Convention on the Elimination of all Forms of Racial Discrimination, 660 U.N.T.S. 195 (Mar. 7, 1966); Convention Concerning Discrimination in Respect of Employment and Occupation, No. 111, adopted June 25, 1958, 362 U.N.T.S. 32.

community.[10] The practices of American employers overseas document violations that should not escape sanction merely because an employee's assignment is to Brussels rather than to Boston.

I. Congressional Intent Must Be Interpreted in Light of Settled Principles of International Law

The en banc opinion of the Court of Appeals for the Fifth Circuit stated that it was considering a single question: "whether Title VII regulates the employment practices of U.S. employers which employ U.S. citizens outside the United States." 892 F. 2d at 1272. Framed procedurally, the question raised was whether the court had subject matter jurisdiction of the case.

Subject matter jurisdiction is determined by an examination of congressional intent. Prescriptive jurisdiction, a doctrine of international law, determines the extent of the reach of national legislation. Congress has the power to violate international law by having its legislation reach beyond the limits specified by international law. Indeed, U.S. courts must enforce congressional statutes if they are constitutional, even though they cause the United States to be in violation of international law.[11] The fact that international law is part of U.S. law does not restrict Congress since international law (except for treaties), as part of the common law of the United States, may be modified by contrary legislation.[12] Nevertheless, a longstanding principle of construction recently reiterated by this Court

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[10] International law is confined to matters between states, not to matters that concern only a single state. See, for example, the jurisdictional limitation of the Court of Justice to "international" law issues. Article 36-2 Statute of the International Court of Justice, 1983 U.N.Y.B. 1334 (entered into force for the U.S. on Oct 24, 1945). The sources of international law, to which the Court may refer, are found in Article 38 of the statute. Id.

[11] F.T.C. v. Compagnie de Saint-Gobin-Pont-A-Mousson, 636 F.2d 1300, 1323 (D.C. Cir. 1980).

[12] The Paquete Habana, 175 U.S. 677 (1900). The Supreme Court in Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 425 (1964), noting with approval the views of Judge Philip Jessup of the International Court of Justice, suggested that international law, together with the act of state doctrine, was a part of federal common law.

states: that "[i]t has been a maxim of statutory construction since the decision in Murray v. The Charming Betsy, 2 Cranch 64, 118 (1804), that 'an act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains . . .'" Weinberger v. Rossi, 456 U.S. 25, 32 (1982). This construction is justified on the ground that Congress, aware of the international law obligations of the United States, would not, without careful thought, cause the United States to violate such obligations. Hence, courts will engage in a careful consideration of congressional intent before concluding that Congress wished to violate international law.[13]

In determining whether construing Title VII of the Civil Rights Act to apply extraterritorially would violate international law, it is necessary to consider the permissible bases of prescriptive jurisdiction under

[13] See infra Section II.

international law. While there are as many as five separate bases to test the validity of a nation's legislative reach in international law, all five are basically designed to find a nexus or connection sufficient to justify application between the legislating nation and the persons or events subject to such legislation. If that nexus or connection is insufficient, the legislation is said to violate international law. Possible bases of jurisdiction will differ, depending upon whether legislation is to be applied in the United States or abroad, and whether American citizens or aliens will be governed by it.

A. International Law Is Not Violated When Title VII Is Applied To U.S. Employers Abroad

The United States historically has been "the most prolific source of extraterritorial law, regulation, and enforcement actions."[14] The post-World War II era has

[14] Small, Managing Extraterritorial Jurisdiction Problems: The United (continued...)

been characterized by increasing assertions of jurisdiction by the United States outside its borders and over aliens. While extraterritorial application of U.S. law may have become the norm in areas such as antitrust and securities law, but the exception where traditional areas of labor regulation are at stake, since the end of World War II discrimination has become recognized to be a matter of important concern throughout much of the world.

1. Territorial Jurisdiction

It is undisputed that a state has the right to legislate with respect both to persons present in its territory and to activities carried on within it.[15] Foley Brothers v. Filardo, 336 U.S. 281 (1949), is often said to have

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[14] (...continued)
States Government Approach, 50 Law & Contemp. Probs. 283, 284 (1987). See also Maier, Book Review, 83 Am. J. Int'l L. 676 (1989) (reviewing The Extraterritorial Application of National Laws (Lange & Brown ed. 1987).

[15] Restatement (Third) of the Foreign Relations Law of the United States §402 (1986).

established a "rebuttable presumption that all legislation is territorial."[16] Noting that "the world's expanding workplace" has forced Congress to shift from domestic to transnational concerns, particularly in the labor area, Professor Turley has recently called for a re-examination of the presumption against extraterritoriality "in light of modern transnational conditions."[17] However, the presumption has not proved to be a barrier to extraterritorial application of U.S. laws, even to aliens, in some areas of the law. As one study noted, "[s]tates, increasingly, attach legal consequences to conduct or events outside their territory involving persons not of their own nationality. They do so, for example, under such legal constructs as 'objective territoriality' or the

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[16] Steinhardt, The Role of International Law as a Canon of Domestic Statutory Construction, 43 Van. L. Rev. 1103, 1144 (1990). Foley is discussed infra at Section IIA.

[17] Turley, "When in Rome: Multinational Misconduct and the Presumption Against Extraterritoriality," 84 Nw.U. L. Rev. 598, 656 (1990).

'effects doctrine,' or under such theories as 'enterprise unity.'"[18] In the antitrust area, in order to subject aliens outside the United States to U.S. law, there was a reinterpretation of the territorial basis of jurisdiction to include actions abroad having "effects" within the United States. United States v. Aluminum Co. of America, 148 F.2d. 416 (2d Cir. 1945) (hereinafter Alcoa) As the Court stated in Alcoa, "[w]e are concerned only with whether Congress chose to attach liability to the conduct outside the United States of persons not in allegiance to it." Id. at 443. The Alcoa court's assertion of jurisdiction was soon followed with court decisions in other areas of the law finding jurisdiction where "effects" of the activity of aliens outside the United States were felt within it." While court decisions in the United States have extended "effects" jurisdiction beyond the antitrust area, it is not a doctrine that has been developed in those areas of the

[18] Reflections on the Current State of Extraterritoriality (Nov. 2, 1984), quoted in Small, supra note 14 at 271, n.40.

law pertaining to personal rights.[19] Cases have interpreted Title VII's geographical reach from within the perspective of nationality rather than territorial jurisdiction.

2. Nationality Jurisdiction

The only issue before this Court is whether Title VII prohibits discrimination by an American employer against an American employee working outside the United States. To subject one's nationals to regulation wherever they may go is a traditional basis of jurisdiction recognized by international law and referred to as the "nationality principle" of prescriptive jurisdiction.[20] Applying Title VII exclusively to American employers

[19] See Turley, supra note 17. Professor Turley compared court decisions interpreting silent or ambiguous statutes and found such inconsistent results between antitrust and securities statutes and employment discrimination and environmental statutes that he concluded that judicial bias, due to a greater sophistication in dealing with extraterritorial market disputes, must be present, Turley, supra note 5 at 348. See also Turley, supra note 17; Note, "Constructing the State Extraterritorial: Jurisdictional Discourse, the National Interest, and Transnational Norms," 103 Harv. L. Rev. 1273 (1990).

[20] Restatement (Third) supra note 15 at §402(2).

abroad does not raise an issue of international law since the only party "affected" by the regulation is the United States.[21]

A longstanding body of decisions establishes that laws "enacted to serve important interests of government" may be applied to U.S. citizens who violate such laws while outside the United States. United States v. Layton, 855 F.2d 1388, 1395 (9th Cir. 1988), cert. denied, 109 S.Ct. 1342 (1989) (quoting Stegeman v. United States, 425 F.2d 984, 986 (9th Cir.) (en banc), cert. denied, 400 U.S. 837 (1970)). For example, the United States

[21] In international law, application of any regulation which causes harm to an individual is considered harm to the state claiming such individual as its national, thus giving such state an international cause of action against the state causing harm. That is, the state suffers injury when its national is harmed in violation of international law. Mavrommatis Palestine Concessions (Greece v. Great Britain), 1924 P.C.I.J., (ser A.) No. 2 reprinted in part in Steiner & Vagts, Transnational Legal Problems 245 (3d ed. 1986). It therefore follows that if the regulating state which purportedly harms the individual also claims that individual as its national, then that state could only have "harmed" itself. No international cause of action is possible. Indeed, one of the principal tenets of international law is that a state (with few exceptions not here relevant), as an integral part of state sovereignty, is free to do as it wishes with respect to its own nationals on the ground that such action is incapable of raising international issues.

subjects its citizens to federal income tax legislation without regard to their presence within U.S. borders. United States v. Bennett, 232 U.S. 299 (1914). United States criminal statutes, even though they may be silent as to the geographical extent of their intended application, often are interpreted to apply to U.S. citizens wherever they may be. United States v. Layton, 855 F.2d at 1395 (9th Cir. 1988)); United States v. Baker, 609 F.2d 134 (5th Cir. 1980); United States v. Zehe, 601 F. Supp. 196 (D. Mass 1985).

The United States does not exercise extraterritorial jurisdiction based upon the nationality principle to the extent that some European countries do because within the United States, state, rather than federal law, is often the basis of regulation.[22] In the post-World War II era, the antidiscrimination principle has become a corner-stone of U.S. federal policy and Congress has enacted a

[22] Restatement (Third), supra note 15 at §402, reporters' note 1.

number of antidiscrimination measures applicable to the activities of American companies abroad. For example, both the anti-boycott provisions of the Export Administration Amendments of 1977, 50 U.S.C. App. §§2401-2407 and the Comprehensive Anti-Apartheid Act of 1986, 22 U.S.C. §§5032, 5034 and 5035 (Supp. 1989) reach U.S. companies overseas, but not their foreign counterparts.[23] Similarly, after various federal courts interpreted the ADEA as inapplicable to American employees abroad because the ADEA, otherwise similar to Title VII, had no alien exemption clause, Congress amended the Act to make clear what case law under Title VII already held: that extraterritorial coverage was

[23] The anti-boycott provisions state that the prohibitions of the Export Administration Amendments of 1977 apply to "any United States person," 50 U.S.C. §2407(a)(1) (Supp. 1990). The anti-apartheid statute's provisions concerning employment practices apply to "any national of the United States that employs more than 25 persons in South Africa," 22 U.S.C. §5034 (1990), and to labor practices of the U.S. Government, 22 U.S.C. §5032 (1990).

limited to American employers,[24] 29 U.S.C. §623(f)(1) (1984). Assertions of U.S. extraterritorial jurisdiction to prescribe the antidiscrimination laws are thus uniformly based on the nationality principle.

B. It Is Not Likely That Congress Intended Title VII To Apply To Alien Employers of Americans Abroad Since To Do So Would Have Violated Then Perceived Notions of International Law

While legislating with respect to the conduct of U.S. citizens abroad is an appropriate exercise of nationality jurisdiction,[25] enacting legislation regulating aliens outside the United States is far more controversial. As one commentator stated, "[i]f all of the defendants are American corporations, imposition of American law is

[24] As in Lavtov v. NCR, 600 F.Supp. 923, the ADEA does not apply to foreign employers operating outside the United States although the American parent may be held liable if certain control tests are met. 29 U.S.C. § 623(h) (Supp. 1989).

[25] A.V. Lowe, a British jurist, agrees: "No international problems are likely to arise as long as American laws are applied only to American nationals. . ." Lowe, "Blocking Extraterritorial Jurisdictions: The British Protection of Trading Interests Act, 1980," 75 Am. J. Int'l L. 257, 267 (1981).

less likely to offend foreign nations. It is when foreign corporations doing business with other foreign corporations find themselves subjected to United States law that the worst problems arise."[26]

1. Jurisdiction over Aliens for Acts Committed Abroad

The Fifth Circuit's decision in the instant case did not restrict itself to a determination of Congress' intent with respect to the application of Title VII to American employers, but appeared to be strongly influenced by its views on an issue not before it, nor now before this Court: the applicability of Title VII to foreign employers employing American citizens abroad.

The Boureslan majority (en banc) stated:

> Finally, if we give extraterritorial reach to Title VII, the plain language of the Act would necessarily extend that title to govern the employment relationship between foreign employers, and their American employees anywhere in the world. See [42 U.S.C.] §2000e (b). We say this because nothing in the Act exempts foreign employers and our courts have held that foreign employers engaged in commerce in the United States are employers under Title VII. See, e.g., Spiess v. C. Itoh & Co. (America), Inc., 643 F2d 353 (5th Cir. 1981). We doubt that Congress ever intended to impose Title VII on a foreign employer who had the grace to employ an American citizen in its own country.

892 F.2d at 1274. A consideration of the principle of prescriptive jurisdiction applicable to aliens can assist in determining the correctness of the Fifth Circuit's assumption.

Conformity with international law is not always assured when legislation regulates a foreigner committing acts abroad. Behavior such as genocide, which is everywhere condemned, may be regulated even as to aliens abroad under the universality principle of jurisdiction. Threats to internationally recognized essential national interests such as counterfeiting are subject to jurisdiction under the protective principle.

[26] Gann, "Foreward: Issues in Extraterritoriality," 50 Law & Contemp. Probs. 1, 18 n.38 (1987).

These are both well accepted principles of international law, and problems only arise with respect to their application.

Exercise of jurisdiction based on the nationality of the victim or person harmed by the conduct to be regulated is less well-accepted. This "passive personality" principle, although asserted prior to 1927 by some states, has never been explicitly accepted (or rejected) in international law.[27]

Unfortunately, the passive personality principle appears to have insinuated itself into the Fifth Circuit's en banc decision. While it might arguably justify application of Title VII to a foreign employer operating abroad, according to the Restatement:

> The passive personality principle asserts that a state may apply law -- particularly criminal law -- to an act committed outside its territory by a person not its national where the victim of the act was its national. The principle has not been generally accepted for ordinary torts or crime, but it is increasingly accepted as applied to terrorist and other organized attacks on a state's nationals by reason of their nationality or to assassination of a state's diplomatic representatives or other officials.

Restatement (Third) of Foreign Relations Law of the United States, §402, comment g (1986) (emphasis added).

Assertions of jurisdiction based upon the passive personality principle are far more common today than they were twenty-six years ago when Title VII first took effect. Professor Andreas F. Lowenfeld, Associate-Reporter for the Restatement (Third), has stated:

> [A]s recently as the early 1960s the Restatement (Second) of the Foreign Relations Law of the United States (1965) found it proper to state as black-letter law that: "[a] state does not have jurisdiction to prescribe a rule of law attaching legal consequences to conduct of an alien outside its territory merely

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[27] While the extraterritorial reach of a Turkish manslaughter statute in the S.S. Lotus (France v. Turkey), 1927 P.C.I.J. (ser. A) No. 10 was explicitly based on the nationality of the victim (i.e., the passive personality principle), the Permanent Court of International Justice ruled in favor of Turkey on other grounds.

> on the ground that the conduct affects one of its nationals." [§30(b)] I believe that statement accurately reflected the American view of international law in 1961 and Congress respected that view.[28]

The Restatement (Second), from which Professor Lowenfeld was quoting, was circulated in draft form in the early 1960s, before its publication in 1965. Thus, when Title VII of the Civil Rights Act was under consideration by Congress, and also when it was enacted, passive personality jurisdiction was considered to be a highly questionable basis upon which to rest prescriptive jurisdiction.

2. Principles of International Law and Administrative and Court Interpretation Favor Restrictive Application of Title VII to Employers Overseas

As discussed in Point I(A)(1) supra, development of the "effects" extension of the territorial principle of prescriptive jurisdiction has not been extended beyond

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[28] Lowenfeld, "U.S. Law Enforcement Abroad: The Constitution and International Law," 83 Am. J. Int'l L. 880, 884 (1989).

cases in the commercial area to those involving personal rights. And many American law experts in 1964 would have considered applying Title VII to alien employers of Americans abroad under the passive personality principle to be an unwarranted exercise of jurisdiction. See Point I(B)(1) supra, Interpreting Title VII to apply to alien employers overseas therefore could contravene the presumption that Congress does not intend to violate international law. Such an interpretation of Title VII is nowhere suggested except in the Fifth Circuit's en banc opinion. This interpretation should therefore be disfavored.

Administrative agencies carefully construe statutes to be consistent with requirements of international law. No administrative or executive agency of government has construed Title VII to apply to foreign employers of American citizens overseas. In keeping with the differences in nationality jurisdiction and passive

personality jurisdiction, see Point I (B) (1) supra, the EEOC seeks to apply Title VII only to American employers employing U.S. citizens abroad as defined in its policy statement.[29]

The only court to have considered the issue has drawn the same distinction. In Lavrov v. NCR, 600 F. Supp. 923, a U.S. parent and a wholly owned German subsidiary were sued under Title VII. The trial court dismissed the subsidiary, holding that Congress could not have intended to include a foreign company operating overseas to be within Title VII's definition of "employer."

The court of appeals' assumption, therefore, cannot be correct. Principles of extraterritorial jurisdiction must be considered in determining whether Congress intended Title VII to apply exclusively to American employers

[29] EEOC Policy Statement on Application of Title VII to American Companies Overseas and to Foreign Companies, Lab. Rel. Rep. (BNA) No. 610, at 401:6063 (Sept. 2, 1988).

overseas. The court's "slippery slope"[30] reasoning ignores longstanding and uncontroversial principles of international law differentiating the type of jurisdiction required to encompass acts of a foreign employer abroad and one involving, as here, an American employer.

C. Concurrent Jurisdiction, Conflicting Regulation, and Balancing

The different bases of international jurisdiction described above may result at times in several states having prescriptive jurisdiction. While an individual may be subject to conflicting regulation if several states, each having a valid basis for prescriptive jurisdiction, simultaneously attempt to regulate the same behavior, there is no violation of international law. Rather, two or more states will have concurrent jurisdiction.[31] Thus, if

[30] See generally Schauer, "Slippery Slopes," 99 Harv. L. Rev. 361 (1985).

[31] See e.g., S.S. Lotus (France v. Turkey), 1927 P.C.I.J. (ser. A) No. 10, where the Permanent Court of International Justice held that an assertion of prescriptive jurisdiction by Turkey in a ship collision case

(continued...)

an American employer is being regulated, nothing in international law prohibits applying Title VII to its alien as well as American employees (the parties protected by the regulation) under the nationality principle.[32] The same potential for conflicting concurrent jurisdictional regulation may therefore exist with respect to both alien and American employees. However, Congress explicitly determined that the United States had an insufficient social interest to warrant such concurrent jurisdictional

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[31] (...continued)
was not otherwise precluded simply because France also had prescriptive jurisdiction. Should the regulation of activities of a national of one state, physically located in the territory of another state, be perceived by the latter to be an unwelcome interference, it can enact contrary legislation (valid under the territorial principle) to offset the perceived interference.

[32] If the United States purports to regulate the acts of foreign employers outside the U.S., then neither the territorial nor the rationality principles can be employed. If that regulation also purports to protect foreign employees, then no other principle saves it from violating international law. However, if protection is limited to American employees, such regulation may fall within the limits of international law under either the passive personality principle or the "effects" extension of the territorial principle. (This is the "slippery slope" assumption referred to by the Court of Appeals when discussing Title VII's alien exemption language. However, the facts of the instant case do not raise "slippery slope" or other issues because both employer and employee are American.)

conflict and therefore chose not to apply Title VII to alien employees abroad.[33]

No evidence of any conflict between the laws of Saudi Arabia and the United States has been presented in this case. Even if a conflict does exist, international law does not require a nation having jurisdiction to refrain from exercising it.[34] As the court stated in Laker Airlines v. Sabena, Belgian World Airlines, 731 F.2d 909, 952 (D.C. Cir. 1984), "there is no rule of international law holding that a 'more reasonable' assertion of jurisdiction mandatorily displaces a 'less

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[33] See Title VII §702, 42 U.S.C. §2000e-1. "[T]he intent of the [alien] exemption is to remove conflicts of law which might otherwise exist between the United States and a foreign nation in the employment of aliens outside the United States by an American enterprise." Civil Rights Hearing on H.R. 7152 Before the House Comm. on the Judiciary, 88th Cong., 1st Sess. 2303 (1963) (testimony of Representative Roosevelt explaining provisions of H.R. 405, which was incorporated into Title VII of H.R. 7152).

[34] For the sources of international law where such a principle would have to be found (primarily custom, convention, or general principles) before it could restrict a state's jurisdiction, see Statute of the International Court of Justice, art. 38, 1983 U.N.Y.B. 1334 (entered into force for the U.S. on Oct. 24, 1945).

reasonable' assertion of jurisdiction as long as both are in fact consistent with the limitations on jurisdiction imposed by international law." 731 F.2d at 952. Put simply, "there is no evidence that interest balancing represents a rule of international law." Id. at 950. During the drafting of the Restatement (Third), a proposal was made to require those states having fewer interests to defer to those having greater interests when conflicts of laws develop. Nevertheless, the final draft of the Restatement used hortatory rather than mandatory language in suggesting the need to balance interests. As Professor Karl M. Meessen has stated: "A state 'should defer' but it does not have to do so."[35]

Thus, international law does not require, as suggested by Judge King in her dissent in Boureslan,[36] application of the reasonableness test of Section 403 of

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[35] Meessen, "Conflicts of Jurisdiction Under the New Restatement," 50 Law & Contemp. Probs. 47, 62 (1967).

[36] 892 F.2d at 1281.

the Restatement (Third) to determine the legitimacy of Title VII's assertion of jurisdiction over American companies employing U.S. citizens overseas. At most, domestic, rather than international law may impose a balancing test for individual statutes. Nothing in Title VII suggests that such a test was meant to be imposed. Adoption of a balancing test could lead to the result that Title VII would be applied extraterritorially with respect to an American employer and employee in one country, while the same employer and employee might not be covered in another country.[37] Unpredictability of result then becomes the rule rather than the exception.[38]

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[37] Compare Lauritzen v. Larsen, 345 U.S. 571 (1953), (holding that the law of a ship's flag (Denmark) rather than the Jones Act, 46 U.S.C. §688, would apply to a maritime tort claim) with Hellenic Lines Ltd. v. Rhoditis, 398 U.S. 306 (1970) (holding that the Jones Act, rather than the law of the flag (Greece) applied), and Romero v. Int'l Terminal Operating Co., 358 U.S. 354 (1958) (applying the Jones Act to a domestic, but not to a foreign, shipowner).

[38] Explicit objection to the balancing approach in U.S. antitrust regulation has been made by Britain on the ground that the lack of predictability in a case-by-case approach would require individuals "to conduct their activities in accordance with American regulations

(continued...)

States may, of course, as a matter of political choice or comity,[39] choose not to exercise jurisdiction even though a legal basis of jurisdiction exists. Such exercises of comity explain many of the precedents upon which Aramco may cite in support of its position.[40]

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[38] (...continued)
wherever there was a mere possibility that they might be found to be subject to American jurisdiction." Lowe, "Blocking Extraterritorial Jurisdiction: The British Protection of Trading Interests Act, 1980," 75 Am. J. Int'l L. 257, 269 (1981), and parliamentary materials cited, id. at n.58.

[39] For a discussion of comity, see Maier, "Extraterritorial Jurisdiction at a Crossroads: An Intersection Between Public and Private International Law," 76 Am. J. Int'l L. 280, 281-85 (1982). The Court's classic definition of the term is:

> 'Comity', in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.

Societe Nationale Industrielle Aerospatiale v. United States Dist. Ct., 482 U.S. 522, 543 n.27 (1987) (quoting Hilton v. Guyot, 159 U.S. 113, 163-64 (1895)).

[40] See e.g., McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10 (1963); Benz v. Compania Naviera Hidalgo S.A., 353 U.S. 138 (1954); Sandberg v. McDonald, 248 U.S. 185 (1918).

II. The Fifth Circuit Required Too Explicit a Statement of Congressional Intent

The Fifth Circuit en banc majority opinion described the issue in Boureslan as "closely analogous" to the overtime compensation issue which the Supreme Court had considered in Foley Bros. Inc. v. Filardo, 336 U.S. 281, and relied upon Foley directly in ruling that Title VII was not intended to be applied abroad. However, the Foley decision is not conclusive here.

A. The Eight Hour Law At Issue In Foley Brothers v. Filardo Was Not Intended To Be Applied Abroad

The Foley Court stated that Congress' failure to distinguish citizen and alien labor abroad under the Eight Hour Law, 40 U.S.C. §324 (repealed in 1962), evidenced a lack of intent to regulate any overseas employment. 336 U.S. at 286. The Eight Hour Law, a statute first enacted in 1868, which required that working hours of employees of the U.S. government and its

contractors be restricted by contract, was never intended by Congress to apply to contracts to be performed abroad, as this Court observed in Foley. The language of the legislation, however, was general, applying to "every contract made to which the United States . . . is a party." Id at 282. In order to restrict its geographical scope, the Court applied a canon of construction: "that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States is a valid approach whereby unexpressed congressional intent may be ascertained. It is based on the assumption that Congress is primarily concerned with domestic conditions." Id. at 285 (citation omitted). The Court then examined both the statute itself, legislative history, and statements from officials of various U.S. government agencies, before concluding that Congress' intention with respect to the Eight Hour Law must have been "the normal one." Id.

The government statements weighed particularly strongly in the Court's consideration. Justice Frankfurter, in a concurring opinion in which Justice Jackson joined, specifically stated that the considerations set forth in the opinion of the Comptroller General, opposing extraterritorial application, "ought properly to take precedence over the literal language of the Eight Hour Law as guides to its interpretation." Id. at 292 (Frankfurter, J., concurring). Justice Frankfurter did not consider himself bound by Vermilya-Brown v. Connell, 335 U.S. 377 (1948), decided earlier that day, only because it dealt with a question of statutory interpretation decided the same Term. In Vermilya-Brown, the Court held that the Fair Labor Standards Act of 1938, 29 U.S.C. §201 (FLSA) applied to Bermuda, an area over which the United States held a lease-hold, but did not have sovereignty. In applying the FLSA extraterritorially the Court relied on the Act's general

commerce clause language and language stating that it applied to "possessions" of the United States. Unlike the Court in Foley, the Fifth Circuit Court of Appeals, en banc, has failed to follow the position advanced by the U.S. government, favoring instead a restrictive interpretation of Title VII.

B. Foley's Determination That Labor and Industrial Relations Are Primarily of Domestic Concern Should Not Characterize the Antidiscrimination Laws Today

Statutes must be interpreted in accordance with their objects and purposes. The Fifth Circuit took the standard which it used to assess Boureslan's arguments directly from Foley: "[a]n intention to regulate labor to conditions which are the primary concern of a foreign country should not be attributed to Congress in the absence of a clearly expressed purpose." 892 F.2d at 1273 (citations omitted) (emphasis added by the Fifth Circuit). It is apparently due to this language in Foley that labor and industrial relations became characterized

as a matter primarily of domestic concern. No language in the Eight Hour Law or in its legislative history suggested that Congress was considering application of that legislation to transnational or foreign activity. Foley, however, cannot freeze for all time this factual determination of Congress' intent in 1892 when it amended the Eight Hour Law, extending coverage of the statute to employees of government contractors. That the Eight Hour Law was deemed to have only a domestic focus at the end of the nineteenth century should not dictate conclusively the characterization of an anti-discrimination law now. By analogizing Title VII to the regulation of overtime compensation overseas, the Fifth Circuit majority trivialized the antidiscrimination laws which are a cornerstone of United States public policy today.

Unlike the situation in Foley, there had been no finding in Boureslan that the protection of American

employees from discrimination was of concern only so long as their American employers kept them within the territorial confines of the United States. While the Restatement (Third) describes industrial and labor relations as activities that are "predominantly local," it also notes assertions of U.S. jurisdiction to combat discrimination abroad. In addition to stating that "some United States civil rights legislation protects United States nationals outside the United States,"[41] the Restatement mentions assertions of U.S. jurisdiction abroad pursuant to the anti-boycott provisions of the Export Administration Amendments of 1977, 50 U.S.C. App. §2407,[42] and the Comprehensive Anti-Apartheid Act of 1986, 22 U.S.C. §§5001, 5032, 5034 and 5035

[41] Compare Restatement (Third), §414, comment, at 271 with Restatement (Third), §721, reporters' note 13, at 243 (1986). The Restatement cites Title VII and Bryant v. International Schools Servs., Inc., 502 F.Supp. 472 (D. N.J. 1980), for the proposition that civil rights legislation of the U.S. sometimes has an extraterritorial reach.

[42] Restatement (Third), §414, reporters' note 4, at 278 (1986).

(Supp. 1989).[43] The Restatement nowhere suggests that protection of Americans from discrimination by their American employers overseas would be only a matter of "local" concern.

C. Foley's "Clearly Expressed Purpose" Standard Should Be Reserved For Legislation in Violation of International Law

The Boureslan en banc majority relied mechanically on Foley by requiring an express statement by Congress. 857 F.2d at 1278 (King, J., dissenting). It should be noted that Foley's requirement of "clearly expressed" congressional intent has not prevented courts from finding the requisite intent in language that is silent or less than clear where important matters of public policy are at stake.[44] Such a showing has generally been

[43] Restatement (Third), §414, reporters' note 10 at 282 (1986).

[44] For instance, criminal statutes "will be applied to U.S., citizens who violated its provisions while outside United States territory" when the crime is not "logically dependent on its locality but which, instead, injures the government wherever the crime occurs." United States v. Bowman, 260 U.S. 94, 97 (1922) as cited in Layton, 855 F.2d 1388. This is true even though there is no "express declaration to that

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required, and then only sometimes, when enforcement of congressional legislation would violate international law.[45]

Professor Lowenfeld has discussed Congress' recent

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[44] (...continued)
This is true even though there is no "express declaration to that effect." Skiriotes v. Florida, 313 U.S. 69, 74 (1940). The Commodities Exchange Act, 7 U.S.C. §62, is completely silent as to jurisdiction over transactions involving "foreign commerce", yet the CEA has been applied exterritorially. Psimenos v. E.F. Hutton, 722 F2d 1041 (2d Cir. 1983). In Tamari v. Bache & Co., 730 F.2d 1103, 1108 (7th Cir. 1984), the court noted that there was no evidence of Congress' intent with regard to the extraterritorial reach of the Commodities Exchange Act. The court concluded that "[f]inding nothing in the Act or its legislative history to indicate that Congress did not intend the CEA to apply to foreign agents, but recognizing that there also is no direct evidence that Congress intended such application, we believe it is appropriate to rely on the 'conduct' and 'effects' tests in discerning whether subject matter jurisdiction exists over this dispute." Id. at 1107. See also Steele v. Bulova Watch Co., 344 U.S. 280, 286-87 (1952) (construing the Lanham Act).

[45] Indeed, authority is unclear as to exactly what showing of Congressional intent must be made before legislation will be interpreted to violate international law. In Rossi, 456 U.S. at 32 (1982), "some affirmative expression of congressional intent" was needed "to abrogate the United States international obligation." On the other hand, in Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 690 (1979), the Court stated that "[a]bsent explicit statutory language, we have been extremely reluctant to find congressional abrogation of treaty rights." According to Professor Steinhardt, "[n]o other court, however, similarly has a required statutory provision to identify and expressly override a particular treaty or customary norm." Steinhardt, supra note 16, at 1166-67 n.275.

exercise of jurisdiction in enacting certain statutes criminalizing terrorist behavior occurring outside the United States, statutes in which extraterritorial jurisdiction (justifiable only by the passive personality principle) was expressly noted. The express statement of such expanded claims of jurisdiction was necessary, Professor Lowenfeld stated, since courts might otherwise have considered the assertion of such jurisdiction to be contrary to international law and would therefore have construed the statutes not to have been intended to apply outside United States territory.[46] Indeed, even after Congress amended the Destruction of Aircraft or Aircraft Facilities Act, 18 U.S.C. §32(a), in 1984 to apply within a "special [extraterritorial] aircraft jurisdiction of the United States," judicial concerns were voiced regarding such jurisdiction. Thus, in United States v. Yunis, 681 F.Supp. 896 (D.D.C. 1988), the court referred

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[46] Lowenfeld, supra note 28.

to the passive personality theory of jurisdiction as an "anathema to United States lawmakers." Id. at 902.

D. Interpreting Title VII to Apply to U.S. Employers Employing Americans Abroad Involves No Violation of International Law, and Congressional Intent Need Not Be Explicitly Stated

The American view of jurisdictional principles of international law at the time of Title VII's enactment in 1964 suggests that it could have viewed the application of Title VII to foreign employers abroad to be a violation of international law. The presumption that Congress does not intend to violate international law, however, should preclude such an interpretation without an explicit statement by Congress. Interpreting Title VII as applicable merely to U.S. employers should require no clearer showing of Congressional intent than can be devised through the usual methods of statutory interpretation.

Like the Fair Labor Standards Act, interpreted in

Vermilya-Brown, supra, as extraterritorially applicable and unlike Foley where the Court rejected extraterritorial application of the Eight Hour Law, Title VII expressly refers to commerce "among the several States; or between a State and any place outside thereof," 42 U.S. §2000(e)(g) (emphasis added). Other briefs submitted to this Court argue that Title VII's language and the legislative history of §702's alien exemption provision indicate that Title VII's language, at a minimum indicates Congress' clear awareness of foreign consequences. The Eight Hour Law interpreted in Foley, by contrast, fails even to hint that Congress was contemplating any international or transnational activity.

As other briefs argue, cases decided prior to the Boureslan court's en banc decision uniformly found jurisdiction over Title VII claims brought by employees of U.S. companies doing business overseas. A clear indication of Congressional intent is also evident from

the legislative history of the ADEA and its 1984 amendment. And the use of alien exemption language in Title VII pertaining to federal employees supports the same conclusion.

The U.S. government, as evidenced by the EEOC Policy statement,[47] supports the extraterritorial application of Title VII. Interpreting Title VII to apply only to U.S. employers abroad cannot violate international law. Unlike the court in Foley, which gave great weight to the government's position,[48] the Fifth Circuit Court of Appeals failed to follow the position advanced by the government, favoring instead a restrictive interpretation. The en banc decision is particularly surprising because the reason for following the government's position in matters relating to foreign relations is compelling. It is sometimes said that in the

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[47] See note 29 supra.

[48] See Section II (A) supra.

States, through all its branches, judicial as well as executive, "speak with one voice."[49]

III. No Special Venue or EEOC Investigatory Problems Arise in Applying Title VII Extraterritorially to American Employers

That Title VII makes no special provisions for venue and EEOC investigative power with respect to exercising jurisdiction abroad was one reason cited by the majority in Boureslan for its holding. 892 F.2d at 1274. However, Title VII provides a choice of venue. As Judge King reminded in her dissent:

> First, Title VII provides for venue not only in the district in which the violation was committed, but also in either the district where relevant employment records are administered, or the district where the aggrieved employee would have worked but for the unlawful employment practice . . . or in the

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[49] Steinhardt, supra note 16. Professor Steinhardt further stated: "Under the one voice maxim, the courts will not presume to revisit political decisions taken by the executive branch or articulate principles of international law that might place the United States in breach of its international obligations or embarrass the conduct of this diplomacy." Id. at 1132.

> have worked but for the unlawful employment practice . . . or in the judicial district in which the respondent has his principal office.

892 F.2d at 1280 (citing 42 U.S.C. §2000e-(f)(3)). Contrary to the majority's reasoning, no special venue problems are created through applying Title VII extraterritorially. Moreover, Aramco has not challenged this Court's venue.

There are many routes which parties to litigation before United States courts can take to secure needed evidence located abroad. Rule 4(i) of the Federal Rules of Civil Procedure provides for service of process overseas. In keeping with international law's acceptance of jurisdiction based on nationality, distinctions are drawn between discovery from U.S. nationals and discovery from aliens. That Congress has the power to legislate with respect to its citizens who are in foreign countries has been clear at least since Blackmer v. United States, 284 U.S. 421, 437 (1932). In Blackmer,

the Court upheld the Act of July 3, 1926, 28 U.S.C. §§711-718, which permits a court of the United States to issue a subpoena requiring "a national or resident of the United States who is in a foreign country" to appear before the court, or to produce documents or other things, if to do so is "in the interest of justice" and the document or other thing, or the testimony in admissible form, cannot be obtained in any other manner.

Treaties to which the United States is a party also contemplate foreign discovery. Article 8 of the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, 20 U.S.T. 361; T.I.A.S. 6638; 658 U.N.T.S. 163 (1969), permits any Contracting State to refuse direct service of judicial documents through diplomatic or consular agents, "unless the document is to be served upon a national of the State in which the documents originate."

When the ADEA was amended in 1984 to provide

extraterritorial coverage, no special provision regarding venue was enacted, nor was overseas investigatory power provided to the EEOC. If, as the Boureslan majority contends, specific provisions are necessary for the overseas application of Title VII, the failure to do so would doom congressional intent. However, no court has questioned the ADEA's extraterritorial application since its amendment in 1984. Surprisingly, in view of this history, Aramco points to the ADEA as an example or clear expression of congressional intent. Obviously, the presence or absence of a special venue provision has no bearing on the jurisdictional question.

The Boureslan court also considered the limitation on the EEOC's investigatory powers to indicate that Congress intended a similar limit on the statute's jurisdiction. However, the EEOC has been held to have investigatory powers abroad even where it does not have

jurisdiction to prosecute a charge.[50] In attempting to buttress its conclusion, the Boureslan court magnified the importance of this restriction. While in some cases, without special venue, investigation by the EEOC might be more difficult, Title VII also provides that a private plaintiff may bring suit and enforce rights guaranteed by Title VII without completion of an EEOC investigation.[51]

The Boureslan majority decision ignores the many existing procedures which permit service of process and the taking of discovery overseas. This is particularly simplified when, as here, all parties to the litigation are U.S. citizens, rendering unnecessary special venue or EEOC investigative provisions.

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[50] EEOC v. Institute of Gas Technology, 24 Empl. Prac. Dec. (CCH) 31,198 (N.D. Ill. 1980). See also Street, "International Commercial and Labor Migration Requirements as a Bar to Discriminatory Employment Practices," 31 How. L.J. 497, 518-19, n.82 (1988), and cases cited therein.

[51] § 706(f)(1).

CONCLUSION

Based upon his nationality, the petitioner in this case is subject to many U.S. laws when he is employed outside the United States. To conclude that Congress intended him to bear the burdens of U.S. laws without the benefits of Title VII's protection, leaving him vulnerable to illegal discrimination by his American employer merely because of his assignment overseas, is to impute to Congress an intent which no evidence supports.

The language, purpose and legislative history of Title VII, and the vital importance of civil rights to Americans everywhere, all indicate that Congress intended that the protections and remedies of Title VII be available to American employees of U.S. employers abroad. The exercise of extraterritorial jurisdiction under Title VII is compatible with principles of international law and requires no clearer expression of Congressional intent than §702 of the statute already provides. For these

reasons, the decision below should be reversed.

Respectfully submitted,

Jane M. Picker
(Counsel of Record)
Kenneth J. Kowalski
Cleveland-Marshall College
of Law
1801 Euclid Avenue
Cleveland, Ohio 44115
(216) 687-3947

Sidney Picker, Jr.
Case Western Reserve
University Law School
11075 East Boulevard
Cleveland, Ohio 44106
(216) 268-3294

Isabelle Katz Pinzler
John A. Powell
American Civil Liberties
Union Foundation
132 West 43 Street
New York, New York 10036
(212) 944-9800

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Nos. 89-1838
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

ALI BOURESLAN and
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Petitioners,

—v.—

ARABIAN AMERICAN OIL COMPANY and
ARAMCO SERVICES COMPANY,
Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF THE SOCIETY FOR HUMAN RESOURCES MANAGEMENT AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

Of Counsel:
BREED, ABBOTT &
MORGAN

KENNETH KIRSCHNER*
JOHN E. PARAUDA
Citicorp Center
153 East 53rd Street
New York, New York 10022
(212) 888-0800

—and—

Of Counsel:
KELLEY DRYE &
WARREN

LAWRENCE Z. LORBER
2300 M Street, N.W.
Washington, D.C. 20037
(202) 955-9600

Attorneys for Amicus Curiae Society for Human Resources Management

(* Counsel of Record)

December 17, 1990

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TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES	iii
STATEMENT OF INTEREST OF AMICUS CURIAE	1
SUMMARY OF ARGUMENT	2
ARGUMENT	5
I. EXCEPT FOR THE ADEA, CONGRESS HAS NEVER SUBJECTED EMPLOYMENT PRACTICES ABROAD TO U.S. PROTECTIVE LABOR LEGISLATION	5
A. Title VII, Like Most Employment Laws, Only Applies Within American Territorial Boundaries	5
B. Similar to Other Protective Labor Legislation, Title VII's Legislative History Does Not Support Extraterritorial Application	6
II. NO DEFERENCE SHOULD BE ACCORDED TO THE EEOC'S INTERPRETATION OF TITLE VII's ALLEGED EXTRATERRITORIAL COVERAGE	8
III. CONGRESSIONAL ACTION SUBSEQUENT TO THE PASSAGE OF TITLE VII SHOWS THAT CONGRESS DID NOT PROVIDE FOR TITLE VII'S EXTRATERRITORIAL APPLICATION	11
IV. THE PRESUMPTION AGAINST EXTRATERRITORIAL APPLICATION OF UNITED STATES PROTECTIVE LABOR LAWS IS BASED ON FIRM POLICY GROUNDS	14

PAGE

A. Practical Considerations of Title VII in a Foreign Context Preclude Extraterritorial Application 14

B. Congress Did Not Apply Title VII to Many Americans in the United States Let Alone to Those Abroad 16

C. The United States Government Itself Recognizes the Differences in Employment Practices Abroad 18

D. Principles of Foreign Sovereignty and Comity Dictate that Title VII Not Be Applied Extraterritorially 21

CONCLUSION 25

TABLE OF AUTHORITIES

Cases PAGE

Abrams v. Baylor College of Medicine, 805 F.2d 528 (5th Cir. 1986) 16

Air Line Dispatchers Ass'n v. National Mediation Board, 189 F.2d 685 (D.C. Cir.), *cert. denied*, 342 U.S. 849 (1951) 5

Ambach v. Norwick, 441 U.S. 68 (1979) 7

Ansonia Board of Education v. Philbrook, 479 U.S. 60 (1986) 9

Benz v. Compania Naviera Hidalgo, SA, 353 U.S. 138 (1957) 5, 11

Boureslan v. Aramco, 857 F.2d 1014 (5th Cir. 1988) . 14

Boureslan v. Aramco, 892 F.2d 1271 (5th Cir. 1990) . 2, 13

Broussard v. L.H. Bossier, Inc., 789 F.2d 1158 (5th Cir. 1986) 17

CFTC v. Nahas, 738 F.2d 487 (D.C. Cir. 1984)..... 9

Cabell v. Chavez-Salido, 454 U.S. 432 (1982) 7

Cleary v. United States Lines, Inc., 728 F.2d 607 (3d Cir. 1984) 9

Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327 (1987) 17

County of Washington, Oregon v. Gunther, 452 U.S. 161 (1981) 1

DeYoreo v. Bell Helicopter Textron, Inc., 785 F.2d 1282 (5th Cir. 1986) 6

PAGE

Donovan v. Texaco, Inc., 535 F. Supp. 641 (E.D. Tex. 1982), *aff'd*, 720 F.2d 825 (5th Cir. 1983) 5

EEOC v. Cherokee Nation, 871 F.2d 937 (S.D. Fla. 1990) 17

EEOC v. Kloster Cruise Ltd., 743 F. Supp. 856 (S.D. Fla. 1990) 6

Espinoza v. Farah Mfg. Co., 414 U.S. 86 (1973) 7, 9-10

FTC v. Campagnie de Saint-Gobain-Pont-A-Mousson, 636 F.2d 1300 (D.C. Cir. 1980) 9

Fernandez v. Wynn Oil Co., 653 F.2d 1273 (9th Cir. 1981) 16, 24

Foley v. Connelie, 435 U.S. 291 (1978) 7

Foley Bros. v. Filardo, 336 U.S. 281 (1949) 5, 11

General Electric Co. v. Gilbert, 429 U.S. 125 (1976) . 9-10

Gutierrez v. Municipal Court, 838 F.2d 1031 (9th Cir. 1981), *vacated*, 109 S. Ct. 1736 (1989) 15

Johnson v. Transportation Agency, 480 U.S. 616 (1987) 1

Lopez v. Pan Am World Services, Inc., 813 F.2d 1118 (11th Cir. 1987) 6

MacNamara v. Korean Airlines, 863 F.2d 1135 (3d Cir. 1988), *cert. denied*, 110 S. Ct. 349 (1989) 8

McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10 (1963) 5, 11

Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986) . 5

Office of Communication of the United Church of Christ v. FCC, 707 F.2d 1413 (D.C. Cir. 1983), *cert. denied*, 471 U.S. 1069 (1985) 9

PAGE

Oyama v. California, 332 U.S. 633 (1948) 7

Patel v. Quality Inn South, 846 F.2d 700 (11th Cir. 1988), *cert. denied*, 489 U.S. 1011 (1989) 7

Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969) 10

Saucido v. Brothers Well Service, 464 F. Supp. 919 (S.D. Tex. 1979) 15

Smith v. Berks Community Television, 657 F. Supp. 794 (E.D. Pa. 1987) 17-18

Smith v. Dutra Trucking Co., 410 F. Supp. 513 (N.D. Cal. 1976), *aff'd mem.*, 580 F.2d 1054 (9th Cir. 1978), *cert. denied*, 439 U.S. 1076 (1979) 17

Sumitomo Shoji America, Inc. v. Avagliano, 457 U.S. 176 (1982) 22-23

Sure-Tan, Inc. v. NLRB, 467 U.S. 883 (1984) 7

Takahashi v. Fish & Game Commission, 334 U.S. 410 (1948) 7

Wards Cove Packing Co. v. Antonio, 490 U.S. 642, 109 S. Ct. 2115 (1989) 1

Watson v. Fort Worth Bank & Trust, 487 U.S. 977 (1988) 1

Weber v. Kaiser Aluminum & Chemical Co., 563 F.2d 216 (5th Cir. 1977), *rev'd*, 443 U.S. 193 (1979) 21

Western Coal Traffic League v. United States, 694 F.2d 378 (5th Cir. 1982), *cert. denied*, 466 U.S. 953 (1984) 9

Zahourek v. Arthur Young & Co., 567 F. Supp. 1453 (D. Colo. 1983), *aff'd*, 750 F.2d 827 (10th Cir. 1984) 11

PAGE

Statutes and Constitutional Provisions

Age Discrimination in Employment Act of 1967, 29 U.S.C. § 601, *et seq.* 3, 6, 13, 17

Americans With Disabilities Act of 1990, 29 U.S.C. § 12101, *et seq.* 14-15

Canada Labour Code, § 5 (1970) 23

Code du Travail arts. L. 122-35, 122-45, 123-1 (Fr.).. 23

Code du Travail art. 511-1 (Fr.)..... 23

Comprehensive Anti-Apartheid Act of 1986, 22 U.S.C. § 5001, *et seq.* 3, 12-13

Eight Hour Law, 40 U.S.C. § 321, *et seq.* 5

Employment Equality Act (Ir. 1977)..... 23

Equal Pay Act, 29 U.S.C. § 206(d) 6

Export Administration Act of 1979, 50 U.S.C. § 2401, *et seq.* (1982 & Supp. III 1985).....3, 11-12

Fair Labor Standards Act, 29 U.S.C. § 201, *et seq.* . 3

Industrial Training Act, 12 Eliz. 2, § 12 (Eng. 1964) . 23

Labor and Workmen Law of 1969 of the Kingdom of Saudi Arabia 18, 23

National Labor Relations Act, 29 U.S.C. § 151, *et seq.* 5, 6

Occupational Safety & Health Act of 1970, 29 U.S.C. § 651, *et seq.* 5, 6

Race Relations Act, 24 Eliz. 2, ch. 74 (Eng. 1976) ... 23

Railway Labor Act, 45 U.S.C. § 151, *et seq.* 5

Sex Discrimination Act, 23 Eliz. 2, ch. 65, (1975).... 23

PAGE

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.* .....*passim*

Unfair Dismissals Act, §§ 1, 6 (Ir. 1977) 23

United States Constitution, Art. II..... 21

Rules and Regulations

29 C.F.R. § 1604.11(b) (1986) 5

29 C.F.R. § 1606.1(c) (1970) 6, 10

29 C.F.R. § 1606.2 (1980)..... 10

41 C.F.R. 60-1.5(2)(3) 21

Executive Order 11246, 30 F.R. 12319 (1965) 21

Congressional Materials

Civil Rights: Hearings on Miscellaneous Proposals Before Subcomm. No. 5 of the House Comm. on the Judiciary, 88th Cong., 1st Sess. (1963) 7

Equal Employment Opportunity: Hearings on H.R. 405 Before the Subcommittee on Labor of the House Committee on Education & Labor, 88th Cong., 1st Sess. (1963)..... 8

Federal Fair Employment Practice Act: Hearings on H.R. 4453, Before a Special House Subcommittee on Education & Labor, 81st Cong., 1st Sess. (1949)... 8

Testimony of General Colin Powell, Chairman of the Joint Chiefs of Staff, before the Senate Armed Services Committee on September 11, 1990, Legi-Slate Report, Nov. 30, 1990..... 20

U.S. Law Affecting Americans Living and Working Abroad, A Report to the Committee on Foreign Relations, United States Senate, August 1980, Government Document No. Y4.F76/2:Am3/5..... 11

PAGE

Periodicals

Boston Globe, Nov. 13, 1990, at 12 20

An Extra Enemy for Women Soldiers, Chicago Tribune, Sept. 2, 1990, at C3 20

Chicago Tribune, Aug. 27, 1990, at C3 20

T. Eisenberg & S. Schwab, *The Facts Clearly Show that Reversal of Anti-Bias Precedent Would Create Hardship*, Manhattan Lawyer, Feb. 28-Mar. 6, 1989, at 16..... 17

New York Times, Nov. 21, 1990, at 10, col. 3..... 20

Some Saudi Women Push Changes, New York Times, Dec. 8, 1990, at 8, col. 3..... 19

Saudi Interior Minister Prohibits All Protests for Change by Women, New York Times, Nov. 18, 1990, at 16, col. 3 19

Americans Rushing to Learn Saudi Culture, Washington Post, Dec. 13, 1990, at A48, col. 1 19

Observing Hanukah in Saudi Arabia: An American's Test of Faith, Washington Post, Dec. 13, 1990, at A43, col. 1 20

Saudi Religious Police Turn More Aggressive, Washington Post, Dec. 13, 1990, at A43, col. 1 18

Washington Times, Sept. 14, 1990, at A10 20

Washington Times, Nov. 22, 1990, at A1 20

Miscellaneous

R. Blanpain & F. Millard, *Comparative Labour Law and Industrial Relations*, 339-340 (BNA) (1982) 23

PAGE

Daily Labor Report, No. 206, p. A-3 (BNA) (Oct. 26, 1989)..... 8

HQDA, Office of the Chief of Public Affairs, Command Information Division, *A Soldier's Guide to Saudi Arabia* (1990) 19-20

International Labor Organization, Convention 111, Discrimination (Employment and Occupation) (adopted 1958) 24-25

K. Kirschner, *The Extraterritorial Application of Title VII of the Civil Rights Act*, 34 Lab. L.J. 394 (1983) 6, 7, 10

Note, *Commercial Treaties and the American Civil Rights Laws: The Case of Japanese Employers*, 31 Stan. L. Rev. 947 (1979)..... 23

Walker, *Treaties for the Encouragement and Protection of Foriegn Investment: Present United States Practice*, 5 Am. J. Comp. L. 229 (1956) 21-22

STATEMENT OF INTEREST OF *AMICUS CURIAE**

The Society for Human Resources Management ("SHRM"), formerly known as the American Society for Personnel Administration ("ASPA"), is the world's largest association of personnel and human resource professionals, representing over 46,000 members in business, government and education both in the United States and abroad dedicated to the furtherance of personnel and human resource management. Organizations represented by SHRM members collectively employ more than 53 million workers. SHRM and its members have an interest in the orderly development and enforcement of the myriad laws and regulations which govern every aspect of employment, including employment discrimination.

SHRM or ASPA have been specifically invited or participated as *amicus curiae* in cases before this Court involving Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq.* (1982) ("Title VII"), including *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989); *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977 (1988); *Johnson v. Transportation Agency*, 480 U.S. 616 (1987); and *County of Washington, Oregon v. Gunther*, 452 U.S. 161 (1981), as well as in numerous cases in the various Circuit Courts of Appeal.

SHRM's affiliate, International HR ("Int'l HR"), includes international human resource practitioners from hundreds of multinational companies and promotes the personal and professional development of those directly involved in international personnel management. Also, SHRM is one of the co-founders of the World Federation of Personnel Management Associations ("WFPMA"), an umbrella organization formed for the purpose of bringing communication and knowledge-sharing to the personnel profession throughout the world. The WFPMA represents 60 national personnel associ-

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* This *amicus* brief is filed pursuant to Supreme Court Rule 37.3, with the written consent of all parties. Letters of consent have been filed with the Clerk of this Court.

ations with approximately 200,000 members worldwide. As the major associations of the human resources profession, SHRM and its affiliates, Int'l HR and WFPMA, are vitally concerned with the law regarding Title VII and its proper role in the international workplace.

The extraterritorial application of Title VII would adversely impact SHRM members and the global business community. The extension of Title VII abroad would create significant problems for multinational employers in attempting to comply with the inconsistent laws of the host country and the United States. Hence, SHRM submits this Brief supporting the Respondents and urges this Court to affirm the decision below of the Fifth Circuit *en banc*, 892 F.2d 1271, which held that Title VII does not apply extraterritorially, based upon, *inter alia*, the Act's language and its legislative history. Moreover, such interpretation is consistent with important practical and policy considerations.

SUMMARY OF ARGUMENT

Petitioners' expansive reading of Title VII to encompass all American citizens in whatever country they may be employed blithely disregards the considerable burden such an interpretation places on the enforcement mechanisms of the statute and the problems it creates for personnel and human resource professionals of foreign and American corporations based abroad. Companies operating in the international marketplace must be sensitive to local laws and customs. Congress has not extended the jurisdiction of most United States protective labor legislation abroad precisely for this reason.

Petitioners' reliance on the deference they claim should be accorded to the EEOC, the agency charged with the enforcement of Title VII, is misplaced in this case. Courts have never blindly adhered to the interpretation of a statute by an agency and have only deferred to such interpretation to the extent it is consistent with statutory language and its accompanying legislative history. Moreover, judicial deference is

inappropriate especially where, as here, an agency attempts to redefine and expand its own jurisdictional boundaries after adhering to a different, more constricted view. This Court should not hesitate to reject the EEOC's erroneous statutory construction which seeks to expand the territorial limits of Title VII far beyond what Congress authorized.

Based upon Congressional action subsequent to the enactment of Title VII, when Congress seeks to apply laws extraterritorially, it does so in specific detail and with narrow proscriptions. For example, the Export Administration Act of 1979 and the Comprehensive Anti-Apartheid Act of 1986 prohibit the exact same types of discrimination as Title VII but, unlike Title VII, they expressly apply to foreign concerns and establishments. If Congress intended Title VII to apply abroad, the above statutes would be completely duplicative of Title VII. Moreover, Congress had to specifically amend the Age Discrimination in Employment Act to apply abroad because the Fair Labor Standards Act, the statute upon which its jurisdiction is based, only applies domestically like all other protective employment legislation including labor relations, occupational safety and health, equal pay, and so forth.

Petitioners give the misimpression that Title VII has extensive application when in fact the opposite is more correct. Title VII does not cover many employees in the United States since it only effects employers with fifteen or more employees which excludes approximately 15% of the domestic workforce. Moreover, religious organizations, independent contractors, volunteer workers, etc. are also exempted within the United States. Expanding the reach of Title VII beyond the territorial borders of the United States, as the EEOC and Boureslan urge, should not be allowed, especially since Title VII was not even intended to reach many employees working within American jurisdictional boundaries.

Petitioners seek to impose United States laws, and the concomitant American beliefs and values which underlie those laws, on other nations which may have differing employee

protection laws, beliefs and values. The U.S. military's instructions to all troops presently stationed in Saudi Arabia not to openly practice or display their religious beliefs and to female troops to conform their behavior to the limitations placed on women by Saudi society, evidences the need to defer to local laws, beliefs and values to avoid actual conflicts. It is for these very reasons that this Court has fashioned a presumption against extraterritorial application of U.S. employment laws and has required a clear expression of Congressional intent to overcome that presumption. Because neither the specific language of the statute nor the legislative history of Title VII expresses such an intent, or even indicates any purpose or need to regulate foreign employment, Title VII should not be applied extraterritorially.

Indeed, absent a treaty, foreign corporations doing business in the United States must comply with our protective laws. Conversely, American corporations or their foreign subsidiaries located abroad must comply with the labor laws of the host foreign country. Many of the laws and customs of foreign countries, to which companies operating overseas must adhere, materially conflict with the mandates of Title VII or create different responsibilities for employers regarding employment rights and obligations. Hence, extraterritorial application would create practical international employee relations problems.

ARGUMENT

POINT I

EXCEPT FOR THE ADEA, CONGRESS HAS NEVER SUBJECTED EMPLOYMENT PRACTICES ABROAD TO U.S. PROTECTIVE LABOR LEGISLATION

A. Title VII, Like Most Employment Laws, Only Applies Within American Territorial Boundaries.

The claim that Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, is unlike other employment legislation ignores the express language of the statute which deals with hiring, discharging, and compensating employees as well as all other terms of employment. 42 U.S.C. § 2000e-2(a)(1). Title VII is an employment statute prohibiting discrimination against persons within protected classes in all areas of workplace activities including job assignments, work schedules, promotions, benefits, compensation, corrective action and so forth.[1] The protection of employee rights through laws respecting self-organization, concerted protected activity, wages and hours and occupational safety and health[2] are no less significant than fair employment practices. Congress did not expressly differentiate Title VII from any other protective labor legislation and, indeed, premised Title VII on the same jurisdictional bases as laws pertaining solely to labor relations. *See* 42 U.S.C. § 2000e(h).

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1 In fact, the EEOC regulates the entire work atmosphere through its guidance on a hostile work environment. *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986); 29 C.F.R. § 1604.11(b) (1986).

2 *See, e.g., McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10 (1963), *Benz v. Compania Naviera Hidalgo, S.A.*, 353 U.S. 138 (1957) (National Labor Relations Act); *Foley Bros. v. Filardo*, 336 U.S. 281 (1949) (Eight Hour Law); *Air Line Dispatchers Ass'n v. National Mediation Board*, 189 F.2d 685 (D.C. Cir.), *cert. denied*, 342 U.S. 849 (1951) (Railway Labor Act); *Donovan v. Texaco, Inc.*, 535 F. Supp. 641 (E.D. Tex. 1982), *aff'd*, 720 F.2d 825 (5th Cir. 1983) (Occupational Safety and Health Act).

Petitioners and their *amici* state that Title VII is different from other protective labor legislation because it deals with discrimination. However, the Equal Pay Act, 29 U.S.C. §§ 206(d), 213(f), which addresses discrimination based on sex, and other laws dealing with discrimination based on union activity (29 U.S.C. § 158(a)(3)) or safety complaints (29 U.S.C. § 660(c)), all of which reflect vital national policy concerns regarding employment, do not apply abroad. *See* n.2, *supra*. The EEOC's and its *amici*'s bald assertion, without legal or factual support, that Title VII is more analogous to antitrust, securities or copyright laws rather than employment laws, does not provide a valid basis to extend extraterritorial jurisdiction. *See* K. Kirschner, *The Extraterritorial Application of Title VII of the Civil Rights Act*, 34 Labor L.J. 394, 400-01 (1983) ("*Extraterritorial Application*").

B. Similar to Other Protective Labor Legislation, Title VII's Legislative History Does Not Support Extraterritorial Application.

Like other protective labor legislation, Congress has not specifically and clearly enunciated Title VII's application to foreign countries.[3] *EEOC v. Kloster Cruise Ltd.*, 743 F. Supp. 856, 858-59 (S.D. Fla. 1990). Congress' oblique reference to aliens in the alien exemption provision was to ensure that such legislation would apply, as the EEOC expressly stated in its initial regulations on this subject, to citizens and *non*-citizens, domiciled or residing in the United States. 29 C.F.R. § 1606.1(c) (1970). For Petitioners and their *amici* to

3 It is up to Congress, not the courts, to expand the jurisdiction of Title VII. When the courts unanimously rejected extraterritorial application of the Age Discrimination in Employment Act, 29 U.S.C. § 601 *et seq.* ("ADEA"), Congress amended such legislation and placed specific appropriate proscriptions on the ADEA's extended coverage. *See Lopez v. Pan Am World Services, Inc.*, 813 F.2d 1118, 1119 n.3 (11th Cir. 1987); *DeYoreo v. Bell Helicopter Textron, Inc.*, 785 F.2d 1282, 1283 (5th Cir. 1986); 29 U.S.C. § 623(h). *See* Point III, *infra*. Unlike the ADEA, which only pertains to age discrimination, application of the panoply of rights in Title VII would cause great problems for employers abroad.

rely on this cryptic reference to aliens, which has its genesis in legislation originally proposed in 1949, stretches advocacy to the outer bounds of reason. Such words were probably inserted regarding aliens to ensure protection of aliens in the United States.[4] The protection of aliens within the United States, as this Court later held,[5] was needed due to the discriminatory application of many laws against aliens in the United States at the time.[6] Indeed, there is still a furor raging with respect to application of protective labor legislation to aliens within the United States.[7]

Most assuredly, if Congress had intended to apply such legislation abroad, Congressional leaders and supporters of Title VII, including representatives of Petitioners' *amici* herein, would have discussed its alleged global application in their testimony. In numerous hearings prior to the passage of Title VII, representatives of the Anti-Defamation League of B'nai B'rith ("ADL"), the American Jewish Congress ("AJC") and the National Association for the Advancement of Colored People ("NAACP") testified before Congress.[8]

4 The Brief of Respondents also points to the need for the alien exemption provision based on a concern of Congress to avoid problems and conflicts with the application of United States employment laws to aliens in U.S. possessions.

5 *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86 (1973).

6 *See, e.g., Takahashi v. Fish & Game Comm'n*, 334 U.S. 410 (1948); *Oyama v. California*, 332 U.S. 633 (1948); *Extraterritorial Application*, *supra* at 400 n.26 (1983).

7 *Compare Sure-Tan, Inc. v. NLRB*, 467 U.S. 883 (1984) and *Patel v. Quality Inn South*, 846 F.2d 700 (11th Cir. 1988), *cert. denied*, 489 U.S. 1011 (1989) *with Cabell v. Chavez-Salido*, 454 U.S. 432 (1982); *Ambach v. Norwik*, 441 U.S. 68 (1979) and *Foley v. Connelie*, 435 U.S. 291 (1978).

8 *See, e.g., Civil Rights: Hearings on Miscellaneous Proposals Before Subcomm. No. 5 of the House Comm. on the Judiciary*, 88th Cong., 1st Sess. (1963) (statement of Herman Edelsberg of the ADL; statement of Will Maslow of the AJC; statements of Roy Wilkins, Clarence Mitchell, Dr. Aaron E. Henry and Rev. Walter Fauntroy of the

The hearings on Title VII contain no statements urging or suggesting extraterritorial application. Instead, the content of the speeches focused on domestic concerns and the eradication of discrimination in this country. *Federal Fair Employment Practice Act: Hearings on H.R. 4453, Before a Special House Subcomm. on Education and Labor*, 81st Cong., 1st Sess. (1949). The statements emphasized throughout that individuals in America should be treated with equal rights.[9]

POINT II

NO DEFERENCE SHOULD BE ACCORDED TO THE EEOC'S INTERPRETATION OF TITLE VII'S ALLEGED EXTRATERRITORIAL COVERAGE

Each federal agency[10] responsible for enforcing protective labor legislation correctly believes its job is of paramount importance. However, an agency's belief that its laws should apply abroad, as has been erroneously asserted at different times by the National Labor Relations Board, the National Mediation Board, the Department of Labor, etc., should not be given credence over the express language of enabling legislation of such agencies or in the absence of any such support in the legislative history thereof.

Ample authority supports the proposition that an administrative agency's interpretation of its extraterritorial jurisdiction may not be entitled to any deference. *CFTC v. Nahas*, 738 F.2d 487, 493 & n.13, 495 & n.17 (D.C. Cir. 1984); *FTC v. Compagnie de Saint-Gobain-Pont-A-Mousson*, 636 F.2d 1300, 1323 & n.130 (D.C. Cir. 1980). The deference argument should not be indulged whenever an agency purports to determine the scope of its own jurisdiction. *Cleary v. United States Lines, Inc.*, 728 F.2d 607, 610 n.6 (3d Cir. 1984); *Office of Communication of the United Church of Christ v. FCC*, 707 F.2d 1413 (D.C. Cir. 1983), *cert. denied*, 471 U.S. 1069 (1985); *Western Coal Traffic League v. United States*, 694 F.2d 378, 383-84 (5th Cir. 1982), *cert. denied*, 466 U.S. 953 (1984).

The EEOC has often sought to expand the coverage of Title VII beyond its intended boundaries, only to have its interpretation of the Act rebuked by the federal courts. *Ansonia Board of Education v. Philbrook*, 479 U.S. 60, 69 n.6 (1986); *General Electric Co. v. Gilbert*, 429 U.S. 125, 141 (1976). For example, in *Espinoza*, *supra*, this Court held that the EEOC's broad interpretation of Title VII to prohibit discrimination on the basis of citizenship was incorrect. In *Espinoza*, the EEOC argued as *amicus curiae* that its interpretation of the Act was entitled to great deference. While acknowledging that EEOC guidelines are entitled to deference, this Court held:

> [D]eference must have limits where, as here, application of the guideline would be inconsistent with an obvious congressional intent not to reach the employment practice in question. Courts need not defer to an admin-

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NAACP); *Equal Employment Opportunity: Hearings on H.R. 405 Before the Subcomm. on Labor of the House Comm. on Education and Labor*, 88th Cong., 1st Sess. (1963) (statement of Murray Gordon of the AJC; statements of Herbert Hill and Rev. Richard Allen Hildebrand of the NAACP); *Hearings on H.R. 4453, infra* (statement of Herman Edelsberg of the ADL; statement of Will Maslow of the AJC; statement of Clarence Mitchell of the NAACP).

9 Civil Rights; *Hearings on Miscellaneous Proposals, supra* at n.8.

10 The State Department which is responsible for foreign affairs has not joined the EEOC and the Department of Justice in this case, unlike the recent case of *MacNamara v. Korean Air Lines*, 863 F.2d 1135, 1138 (3d Cir. 1988), *cert. denied*, 110 S. Ct. 349 (1989), dealing with foreign employers doing business in the United States.

On October 24, 1989, in a panel session sponsored by the American Bar Association, the Federal Bar Association and the District of Columbia Bar, a Legal Advisor for the State Department disagreed with the EEOC's extraterritorial interpretation relating to employment discrimination:

> The general counsel of the Equal Employment Opportunity Commission [Charles A. Shanor] and a legal adviser for the Department of State [Ted A. Borek] were unable even to agree on the . . . application of fair employment laws to transnational corporations in the United States and abroad.

Daily Labor Report, No. 206 at A-3 (BNA) (Oct. 26, 1989).

istrative construction of a statute where there are "compelling indications that it is wrong."

414 U.S. at 94-95 (quoting *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 381 (1969)).

There are several infirmities in the EEOC's argument that its extraterritorial interpretation is entitled to deference. First, neither the EEOC nor the Department of Justice has any special expertise in the area of foreign employment or affairs. This is not a question of whether certain conduct amounts to a prohibited form of employment discrimination but, instead, a matter of statutory interpretation as to whether an act of Congress can be applied outside the United States in the absence of any clear indication of such foreign coverage.

Second, the position now taken by the EEOC "contradicts the position which the agency had enunciated at an earlier date, closer to the enactment of the governing statute." *General Electric*, 429 U.S. at 142. Thus, until 1980, the EEOC provided that Title VII protects all individuals, both citizens and noncitizens, *domiciled or residing in the United States*, against discrimination. . . ." 29 C.F.R. § 1606.1(c) (1970) (emphasis added). Indeed, the EEOC's pre-1980 regulations regarding the alien exemption provision seemed to comport with the *Espinoza* Court's interpretation which cited such regulations approvingly. *Espinoza*, 414 U.S. at 95 n.8; *Extraterritorial Application*, *supra*, 399 & n.24. However, in 1980, the EEOC revised its regulations and eliminated this provision without explanation. *See* 29 C.F.R. § 1606.2 (1980). Hence, the EEOC's position has been inconsistent and contradictory.

Finally, the lack of any specific Congressional grant of authority for extraterritoriality also cuts against deferral to the EEOC. The very fact that the EEOC must rely on a negative inference or an implication to be discerned from the alien exemption in Section 702 shows the lack of explicitness required to find that a United States labor law should apply extraterritorially. The EEOC's position rests ultimately on the proposition that the Congress acts by silence and obfuscation. *See McCulloch*, *Benz* and *Foley*, *supra*. Moreover, Congress itself has not indicated in any way that Title VII applies to Americans working abroad. *See Zahourek v. Arthur Young & Co.*, 567 F. Supp. 1453, 1455-56 (D. Colo. 1983), *aff'd*, 750 F.2d 827 (10th Cir. 1984); *U.S. Law Affecting Americans Living and Working Abroad, A Report to the Committee on Foreign Relations, United States Senate*, August 1980, Government Document No. Y4.F76/2:Am3/5.

Accordingly, this Court should not defer to the EEOC's position on its own jurisdiction and instead should decline to apply Title VII extraterritorially.

POINT III

CONGRESSIONAL ACTION SUBSEQUENT TO THE PASSAGE OF TITLE VII SHOWS THAT CONGRESS DID NOT PROVIDE FOR TITLE VII'S EXTRATERRITORIAL APPLICATION

Congress' rare forays into the field of labor relations affecting foreign countries have always been done deliberately, through the use of specific and express language. In the Export Administration Act of 1979, 50 U.S.C. App. §§ 2401-2420 (1982 & Supp. III 1985) ("EAA"), Congress demonstrated that it knows how to apply United States' laws extraterritorially when it so chooses. Unlike the oblique alien exemption language in Section 702 of Title VII relied on by Boureslan and the EEOC, the EAA's extraterritorial reach is clearly stated. The term "United States person" is defined to include "any domestic concern (including any permanent domestic establishment of any foreign concern) and any foreign subsidiary or affiliate (including any permanent foreign establishment) of any domestic concern which is controlled in fact by such domestic concern . . . ." 50 U.S.C. App. § 2415(2) (1982). The EAA then provides that:

> [T]he President shall issue regulations prohibiting any *United States person*, with respect to his activities in the interstate or foreign commerce of the United States,

> from taking . . . any of the following actions with intent to comply with . . . any boycott fostered or *imposed by a foreign country* against a country which is friendly to the United States . . . :
>
> • • •
>
> (B) Refusing . . . to employ or otherwise *discriminating against any United States person on the basis of race, religion, sex or national origin of that person*. . . .

50 U.S.C. App. § 2407(a)(1) (1982) (emphasis supplied).

The above provisions prohibit an American corporation, or its foreign affiliates, from discriminating against United States citizens in their employment overseas on the basis of race, religion, sex or national origin pursuant to a boycott ordered by a foreign country. Congress obviously did not view Title VII as having extraterritorial coverage when it promulgated the EAA in 1979 because the EAA's discrimination provisions would then be merely redundant to the discrimination provisions set forth in Title VII.

If Congress viewed Title VII as having extraterritorial reach, which is not indicated in its legislative history, then the EAA's prohibition of employment discrimination by American corporations against American citizens need never have been drafted. Indeed, the EAA evidences Congress' recognition that Title VII does not apply overseas and provides a vivid example of how Congress uses express language to overcome the presumption against extraterritorial coverage.

In the Comprehensive Anti-Apartheid Act of 1986, 22 U.S.C. §§ 5001-5116 (Supp. V 1987), Congress required that "[a]ny *national of the United States* that employs more than 25 persons *in South Africa* shall take the necessary steps to insure that the Code of Conduct is implemented. . . ." 22 U.S.C. § 5034 (emphasis supplied). The term "national of the United States" is defined to include any corporation incorporated in the United States. 22 U.S.C. § 5001(5). Like the EAA, this statute provides another example of how Congress explicitly sets forth its intention to apply United States' laws extraterritorially, and how Congress does not resort to negative inferences for this purpose.

The types of discrimination prohibited by the Code of Conduct are limited to race and ethnic origin. 22 U.S.C. § 5035(a)(2). Congress did not include religion and sex in drafting this statute specifically dealing with employment in a foreign nation. Even with respect to the common prohibitions against race and ethnic discrimination, if Title VII applied overseas, it would cover an employer in South Africa with fifteen or more employees while the Comprehensive Anti-Apartheid Act applies to employers with more than twenty-five employees. This variance in coverage over allegedly identical prohibitions is puzzling if one accepts the theory that Title VII applies overseas. More importantly, if Congress had originally intended Title VII to apply extraterritorially, it is inexplicable why it would subsequently draft a redundant equal employment opportunity provision that was already encompassed by Title VII.

The explicit language in the EAA and the Anti-Apartheid Act, as well as the amended ADEA, indicating Congress' intent to apply such laws abroad, is consistent with the cautious approach the United States Congress has taken in addressing issues impacting on United States corporations doing business abroad. It also contrasts markedly with the EEOC's newfound willingness (after many years of taking a different position) to traipse into foreign countries and administratively dictate American employment policies on the strength of only a negative inference. Indeed, as the *en banc* majority stated below regarding the EAA and the Anti-Apartheid Act:

> Congress demonstrated in the above acts its awareness of the need to make a clear statement of extraterritorial application, address the concerns of conflicting foreign law, and provide the usual nuts-and-bolts provisions for enforcing those rights.

Boureslan, *supra*, 892 F.2d at 1274.

POINT IV

THE PRESUMPTION AGAINST EXTRATERRITORIAL APPLICATION OF UNITED STATES PROTECTIVE LABOR LAWS IS BASED ON FIRM POLICY GROUNDS

A. Practical Considerations of Title VII in a Foreign Context Preclude Extraterritorial Application

In advancing policy arguments for applying Title VII abroad, the EEOC and the *amici* supporting Boureslan conveniently ignore the policy considerations which are embodied in the presumption itself. As summed up by the initial Fifth Circuit majority in this case:

> [W]e cannot ignore strong countervailing policy arguments against the application of Title VII abroad. The religious and social customs practiced in many countries are wholly at odds with those of this country. Requiring American employers to comply with Title VII in such a country could well leave American corporations the difficult choice of either refusing to employ United States citizens in the country or discontinuing business.

857 F.2d at 1020. Will U.S. and foreign employers in foreign countries, which would be swept into the ambit of the EEOC's interpretation, now be required to include Americans abroad in affirmative action plans based upon worldwide employment, be required to file EEO-1 forms and reports, and be subject to EEOC inspection, recordkeeping and notice posting requirements in foreign work places? These issues were never addressed by Congress in either Title VII or its legislative history, not because of an oversight by Congress, but because foreign application of Title VII was never intended.

Under the EEOC's theory, if Title VII applies abroad, so would the statutory provisions of the Americans with Disabilities Act of 1990, 29 U.S.C. § 12101, *et seq.* ("ADA"). Thus, United States and foreign employers abroad would have to reconstruct their facilities to ensure accessibility,

accommodate handicapped persons abroad, make qualified interpreters and readers available, and so forth because the remedial section of the ADA incorporates Title VII's enforcement mechanism. 42 U.S.C. § 12117. To further show Congress could not have intended Title VII to apply abroad, the remedial measures currently taken by the EEOC within the United States with respect to English-only rules, prohibitions on speaking foreign languages, requiring fluency and proper accents, would pose great problems in foreign countries. *See, e.g., Gutierrez v. Municipal Court*, 838 F.2d 1031 (9th Cir. 1988), *vacated*, 109 S. Ct. 1736 (1989); *Saucido v. Brothers Well Service*, 464 F. Supp. 919 (S.D. Tex. 1979).

The workforce at a foreign worksite of a U.S. corporation will usually be multinational. The greatest percentage of the employees, as in the case of Aramco, will often be from the host country. Thus, the legal fiction of assigning U.S. nationality to a corporation does not change the underlying fact that persons who act on behalf of the corporation, *i.e.*, its managers, supervisors and employees, are often not U.S. citizens. Consequently, the persons allegedly engaging in discriminatory conduct such as creating a hostile work environment,[11] denying promotions on the basis of national origin, terminating employees on the basis of race or assigning work on the basis of sex will be foreign nationals or citizens of other nations.[12] Therefore, although a plaintiff in such actions may be a U.S. citizen, application of Title VII to U.S. or foreign corporations abroad would inevitably result in the regulation of foreign nationals which would be a

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11 Applying Title VII abroad to allegations of sexual harassment may be extremely difficult. The social mores of certain Latin American and European cultures may permit as perfectly acceptable words or conduct that may be offensive here in the United States and proscribed by the EEOC's rules on sexual harassment. In Saudi Arabia, women are not even permitted to work with men based on the Saudi's interpretation of the Koran. Labor and Workmen Law of Saudi Arabia, Article 160.

12 In this particular case, the supervisor complained of by Boureslan was a citizen of Great Britain.

source of international discord. These same foreign nationals, while they would be subject to Title VII's prohibitions in conducting themselves towards U.S. citizens, would not enjoy the benefits of Title VII.

Without any empirical or other support, Petitioners attempt to paint an ominous picture of the future for Americans employed abroad in the event Title VII is not applied extraterritorially. They speculate that minorities and women will decline overseas assignments to avoid being subject to discrimination, will lose opportunities for advancement if they decline such assignments and will be terminated if they accept such assignments. They further surmise that employers will in turn hire only white Anglo-Saxons to work abroad, will launder their discrimination and will send persons overseas in an effort to avoid compliance with fair employment laws. Contrary to the hypotheticals posed by Petitioners, the courts have already addressed the issue of discriminatory conduct in the United States having potential effect on foreign employment. Such conduct has already been held to be a violation of Title VII and would not be affected by the outcome of this case. *Abrams v. Baylor College of Medicine*, 805 F.2d 528 (5th Cir. 1986); *Fernandez v. Wynn Oil Co.*, 653 F.2d 1273 (9th Cir. 1981). Moreover, Petitioners ignore the numerous discrimination laws of other countries, adapted to the circumstances of each country, which would protect against any discrimination abroad.

Any U.S. corporation doing business in a foreign country will be subject to the host country's laws by virtue of having availed itself of the benefits of doing business in that country. Indeed, it is not the prospect of regulation that SHRM and its members fear, but the prospect of dual and, inevitably, inconsistent and conflicting regulation.

B. Congress Did Not Apply Title VII to Many Americans in the United States Let Alone to those Abroad

Title VII has never applied to all American citizens employed by American companies even in the United States.

Indeed, according to the EEOC's own statistics, Title VII *does not apply* to *over 85 percent* of all domestic business establishments or to about *15 percent* of the workforce employed in this country amounting to the exclusion from Title VII of more than ten million working Americans within the territorial borders of the United States. T. Eisenberg & S. Schwab, *The Facts Clearly Show that Reversal of Anti-Bias Precedent Would Create Hardship*, Manhattan Lawyer, Feb. 28-Mar. 6, 1989, at 16.[13]

Indeed, under the terms of the statute itself, Title VII does not protect numerous Americans and aliens working in the United States. *See, e.g.*, 42 U.S.C. § 2000e(b) (employers with fewer than 15 employees not subject to Title VII); 42 U.S.C. § 2000e(f) (elected public officials and their personal staff, immediate advisers and policy-making appointees not protected by Title VII); 42 U.S.C. § 2000e-1 (employees of a religious society or religious educational institution alleging religious discrimination not protected by Title VII); 42 U.S.C. § 2000e-2(i) (employees of business on or near an Indian reservation alleging preferential treatment of Indians not protected by Title VII).

In addition to these statutory exceptions, case law has established further situations to which Title VII is not applicable. *See, e.g., Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327 (1987) (religious organizations exempted from aspects of Title VII); *Broussard v. L.H. Bossier, Inc.*, 789 F.2d 1158, 1160 (5th Cir. 1986) (independent contractor not protected by Title VII); *Smith v. Dutra Trucking Co.*, 410 F. Supp. 513 (N.D. Cal. 1976), *aff'd mem.*, 580 F.2d 1054 (9th Cir. 1978), *cert. denied*, 439 U.S. 1076 (1979) (same); *Smith*

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13 Apparently, the EEOC is seeking to expand its jurisdiction and coverage on all fronts. The EEOC was recently rebuffed in its attempt to apply the ADEA to Indian tribes. The Tenth Circuit held that the ADEA, like Title VII, should not apply to the Cherokee Nation. *EEOC v. Cherokee Nation*, 871 F.2d 937 (10th Cir. 1989).

v. Berks Community Television, 657 F. Supp. 794 (E.D. Pa. 1987) (volunteer workers are not employees under Title VII).

Since Title VII does not even apply to many Americans in the United States, it would be ludicrous to assume that Congress intended it to apply to all American citizens working in foreign countries. Moreover, contrary to the assertion of Petitioners' *amici*, if Title VII does not apply to all persons within the United States, why would anyone working overseas believe that such law would apply to them, especially when almost all other protective labor legislation does not? *See* Point I, *supra*.

C. The United States Government Itself Recognizes the Differences in Employment Practices Abroad

The practical and political pitfalls of applying Title VII extraterritorially are well-exemplified by the instant case. Saudi Arabia is an Islamic country. The Koran, or Moslem holy book, serves as the state's guiding document and the customs and practices of Islam are protected by the legal system of Saudi Arabia. In Saudi Arabia, the Labor and Workmen Law of 1969 ("Labor Law") regulates all employment within its borders, including that of foreign companies and foreign employees.

Obvious conflicts exist between Title VII and Saudi Arabian law. Thus, the law requires Saudi Arabs to be favored over all others (Article 45 of the Labor Law) and, consistent with Islamic Law, prohibits women from commingling in the workplace with men (Article 160 of the Labor Law). Additionally, Islam is the official state religion and guiding force of the Kingdom.[14]

The limits placed on women in Saudi society highlight the magnitude of the conflict that would ensue if employers applied Title VII in Saudi Arabia. Legally, Saudi women cannot do anything alone that might allow them to somehow encounter a man on their own to whom they were not

14 *See Saudi Religious Police Turn More Aggressive*, Washington Post, Dec. 13, 1990, at A43, col. 1.

related, including leaving home, travelling, eating, or staying in a hotel.[15] Women are also prohibited from driving. "In public, Saudi women are required to wear a black robe covering almost all their body and usually a veil to cover their hair and face as well." *Saudi Women*, New York Times, Dec. 8, 1990, at 8, col. 3. Yet, if U.S. employers were to apply even some of these limitations to U.S. women working abroad, they would conflict with the mandates of Title VII if the statute is found to apply overseas.

In recognition of these cultural differences between the United States and its host in the Persian Gulf, the U.S. Department of Defense has implemented policy guidelines for American military personnel in Saudi Arabia. In a booklet entitled *A Soldier's Guide to Saudi Arabia*, published by the United States Army,[16] the government states: "As in other nations, foreigners must comply with the laws of Saudi Arabia while staying there" whether or not they conflict with American Laws. Guide at 27. The Guide further states: "As guests within a host country, you should avoid subjects or situations which are sensitive to Saudis and other Arabs," listing a dozen such sensitive areas. Guide at 29. The Army then provides a list of "Do's" and "Don'ts" for its personnel in Saudi Arabia under such headings as "working with Arabs," "religion," "women," "foreigners and the law," and "sensitivities." In deference to the Islamic religion, military personnel are not to "[d]isplay a crucifix or star of David in public, even as jewelry." Guide at 19. As reported in the press, U.S. chaplains and rabbis are not permitted to wear crosses or stars of David while in Saudi Arabia, all non-Muslim religious services are to be conducted secretly, religious items often are removed from packages sent to U.S.

15 *See Some Saudi Women Push Changes*, New York Times, Dec. 8, 1990, at 8, col. 3 ("*Saudi Women*"); *Saudi Interior Minister Prohibits All Protests for Change by Women*, New York Times, Nov. 18, 1990, at 16, col. 3; *Americans Rushing to Learn Saudi Culture*, Washington Post, Dec. 13, 1990, at A48, col. 1.

16 HQDA, Office of the Chief of Public Affairs, Command Information Division, *A Soldier's Guide to Saudi Arabia* (1990).

service personnel, and in the event U.S. troops are in Saudi Arabia over Christmas and Hanukah any celebrations are to be severely curtailed.[17]

The Army has advised women military personnel to "dress in a manner acceptable to Arabs." Guide at 23. While uniforms are always acceptable, "for civilian attire Western clothing is OK if it fits loosely and covers the neck, arms and legs. . . . Don't wear pants in public unless they're part of your authorized uniform . . . [and don't] wear tight or revealing clothing in public, considered immodest and undignified in Arab culture." *Id.* Women are also advised to "[e]xpect to ride in the back of public buses" and "to be excluded from some stores." *Id.* They are also told not to "[k]iss, touch or show affection toward any man, including a non-Saudi man, in public" and that "[d]ancing in public and mixed swimming/bathing are forbidden . . . ." *Id.* at 22-23.[18] According to General Colin Powell, United States women are being requested to "respect the customs and traditions of the country in which we are guests."[19]

It is quite appropriate for the U.S. government to impose such restrictions on its own civilian and military personnel in Saudi Arabia out of a concern for the religious and other practices and sensitivities of their foreign host. It is inconsis-

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17 *See* Washington Times, Nov. 22, 1990, at A1; New York Times, Nov. 21, 1990, at 10, col. 3; Washington Times, Sept. 14, 1990, at A10. The seizure of religious items was confirmed by General Colin Powell, Chairman of the Joint Chiefs of Staff, in testimony before the Senate Armed Services Committee on Sept. 11, 1990. Reported in Legi-Slate Report, Nov. 30, 1990 at 27, 41, 46-47. *See also Observing Hanukah in Saudi Arabia: An American's Test of Faith*, Washington Post, Dec. 13, 1990, at A43, col. 1.

18 U.S. servicewomen are required to cover their arms and legs at all times, and "have been told to avoid wearing shorts, uncovering their arms, driving vehicles, walking unescorted, chatting casually in public with men who are not their husbands or stripping down to their T-shirts, as their male counterparts do." *An Extra Enemy for Women Soldiers*, Chicago Tribune, Sept. 2, 1990, at C3. *See also* Boston Globe, Nov. 13, 1990, at 12; Chicago Tribune, Aug. 27, 1990, at C3.

19 Testimony of General Colin Powell, *supra*, at n.17.

tent, however, for the same government to seek to impose different standards and values on U.S. private employers of U.S. citizens in foreign workplaces without the same solicitude to the same host. It is obvious that Congress never considered any of these matters when it passed Title VII in 1964.

Of particular interest in this regard are the regulations of the Office of Federal Contract Compliance Programs ("OFCCP"), the agency within the U.S. Department of Labor charged with administering Executive Order 11246. Executive Order 11246 creates the nondiscrimination and affirmative action requirements for all Federal contractors. The parallel responsibilities and obligations of Title VII and Executive Order 11246 have long been recognized by the courts. *See, e.g., Weber v. Kaiser Aluminum & Chemical Co.*, 563 F.2d 216 (5th Cir. 1977), *rev'd on other grounds*, 443 U.S. 193 (1979). The regulations of the OFCCP explicitly exempt from coverage work performed outside the United States. 41 C.F.R. § 60-1.5(a)(3). It is an anomalous position for one part of the government's nondiscrimination enforcement mechanism to claim extraterritorial reach without statutory support while its sister agency, created by Executive Order, and thus expressly representing the intent of the Executive Branch, disclaims such reach.

D. Principles of Foreign Sovereignty and Comity Dictate That Title VII Not Be Applied Extraterritorially

Since its inception, the United States has favored the free international movement of private capital, encouraging the investment of foreign capital in this country and encouraging United States corporations to invest their capital abroad. H. Walker, *Treaties for the Encouragement and Protection of Foreign Investment: Present United States Practice*, 5 Am. J. Comp. L. 229 (1956). The United States has effectuated this policy through the bilateral treaty of friendship, commerce, and navigation ("FCN treaty")[20] which "provide extensively for the rights of each country's citizens, their property and

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20 FCN treaties are Article II treaties in that they are ratified by the Senate pursuant to Article II of the Constitution.

other interests, in the territories of the others, and for the rules mutually to govern their trade and shipping." *Id.* at 230.

The purpose of the FCN treaties is to ensure equality of treatment, known as national treatment, to foreign businesses and their employees in a foreign country. The treaties allow Americans to work overseas subject only to the limitations imposed by the host country on its own citizens.

The EEOC's position in this litigation runs contrary to the FCN treaties and the notion of national treatment by unilaterally giving American citizens further noncontingent rights not accorded to the host country's citizens. American companies doing business abroad would be required to comply with the inconsistent provisions of the laws of the host country and with Title VII. As such, they would be disadvantaged compared to their foreign counterparts because the latter would only have to comply with the laws of the host country.

By contrast, foreign corporations doing business in the United States must comply with Title VII but need not adhere to their own countries' employment laws here. Indeed, if certain foreign countries such as South Africa sought to apply their laws to companies in the United States, it would surely run afoul of American laws. Likewise, American companies abroad should only be legally required to adhere to the host country's rules without the dual obligation of compliance with United States protective labor legislation abroad.

The international employment arena was explored by this Court in *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176 (1982), which held that a commercial treaty between the United States and Japan did not insulate an American subsidiary of a Japanese company doing business here from the prohibitions of Title VII. Plaintiffs alleged sex and national origin discrimination in the company's hiring of its employees in the United States. This Court held that foreign enterprises that engage in business in the United States are subject to the provisions of Title VII.

Based upon the same reasoning in *Sumitomo*, foreign nations apply their employment laws with equal force to American corporations or foreign subsidiaries doing business abroad. Such American companies, like foreign corporations in the United States, must comply with the employment laws governing all employees, both U.S. citizens and aliens, within the host country's borders, as well as the customs or practices which are protected or given effect by the foreign legal system. Foreign countries impose restrictions against discrimination,[21] promulgate laws requiring or permitting favoritism to certain groups,[22] and establish laws setting up tribunals to resolve these matters,[23] all of which may be different from Title VII. Accordingly, applying employment laws extraterritorially often creates irreconcilable conflicts because a foreign based employer would be required to comply not only with the laws of its host nation, but also with different American

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21 *See, e.g.*, Code du Travail [C. Trav.], arts. L. 122-35, 122-45, 123-1 (French laws prohibiting employment discrimination on the basis of sex, marital status, national origin, religion or handicap); Sex Discrimination Act, 23 Eliz. 2, ch. 65 (1975), Race Relations Act, 24 Eliz. 2, ch. 74 (1976), (English laws prohibiting sex, race or national origin discrimination); Unfair Dismissals Act, § 6 (1977), Employment Equality Act (1977) (Irish laws prohibiting employment discrimination on basis of religious or political beliefs, race, pregnancy, sex and marital status); Canada Labour Code, § 5 (1970) (prohibition against race, national origin and religious discrimination).

22 *See, e.g.*, Labor and Workmen Law of 1969 of the Kingdom of Saudi Arabia, arts. 44, 45, 49 and 50 (Saudi Arabia) (Saudi Arabian laws requiring 75% of workforce to be nationals and giving hiring preference to nationals); Note, *Commercial Treaties and the American Civil Rights Laws: The Case of Japanese Employers*, 31 Stan. L. Rev. 947, 953 n.33 (1979) (American treaties with Nicaragua and France, in deference to laws of those countries, limit hiring of foreign employees). *See generally* R. Blanpain & F. Millard, *Comparative Labour Law and Industrial Relations* 339-340 (BNA) (1982).

23 *See, e.g.*, Labor and Workmen Law of 1969 of the Kingdom of Saudi Arabia, arts. 172-178 (Saudi Labor Tribunals); C. Trav. art. 511-1 (French Labor Tribunal); Unfair Dismissals Act, § 1 (1977) (Irish Employment Appeals Tribunal); Industrial Training Act, 12 Eliz. 2, § 12 (1964) (English Industrial Tribunals).

laws, even though the employees in question work solely within the host nation.

Examples of these conflicts include laws and practices favoring those of particular religions or non-religions (such as the favoring of Catholics or Moslems in countries predominately of that religion or of atheists in communist countries), favoring men over women (as in Japan or some South American countries), favoring certain racial or ethnic groups (as Japanese in Japan) or discriminating against persons of certain national origins (as Greeks in Turkey and Turks in Greece). Although favoritism laws and practices contravene American morals and values and conflict with Title VII, an American employer abroad would have to comply with such laws and customs just as foreign companies in America must comply with Title VII. As the court held in *Fernandez v. Wynn Oil Co.*, 653 F.2d 1273, 1277 (9th Cir. 1981), "the United States cannot impose standards of non-discriminatory conduct on other nations through its legal system," just as "[n]o foreign nation can compel the non-enforcement of Title VII here." (Footnote omitted).

SHRM's position is predicated on the practical and legal problems which would be created by the adoption of Boureslan's and the EEOC's position. While the application of our own democratic and humane notions of workplace equity is a desirable development in the United States, and one to which our government devotes considerable energy, the position advanced by Boureslan and the EEOC is quite different. They ask this Court to endorse the internationalization of our domestic labor laws. Such a development runs counter to the historical practices of the United States.

For example, of the 149 ratified conventions of the International Labor Organization ("ILO"), the United States has ratified only ten. While the conventions merely commit ratifying countries to pass domestic implementing legislation, Congress has historically refused to subject domestic labor legislation to international oversight. In particular, Convention 111, Discrimination (Employment and Occupation),

adopted by the ILO in 1958, has not been ratified by the United States even though our domestic legislation, including Title VII, exceeds the standards set by that convention. It thus defies logic and historical experience to believe that the Congress intended by silence and indirection to internationalize the reach of Title VII.

Accordingly, important policy concerns dictate that Title VII should not be applied extraterritorially.

CONCLUSION

For all of the foregoing reasons, *Amicus Curiae* Society for Human Resources Management respectfully urges this Court to affirm the decision below.

Respectfully submitted,

Of Counsel:
BREED, ABBOTT & MORGAN

KENNETH KIRSCHNER*
JOHN E. PARAUDA
Citicorp Center
153 East 53rd Street
New York, New York 10022
(212) 888-0800

—and—

Of Counsel:
KELLEY DRYE & WARREN

LAWRENCE Z. LORBER
2300 M Street, N.W.
Washington, D.C. 20037
(202) 955-9600

Attorneys for Amicus Curiae, Society for Human Resources Management

(*Counsel of Record)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

ALI BOURESLAN and
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Petitioners,

v.

ARABIAN AMERICAN OIL COMPANY, *et al.*,
Respondents.

On Writs of Certiorari to the
United States Court of Appeals
for the Fifth Circuit

BRIEF OF *AMICI CURIAE* RULE OF LAW COMMITTEE AND THE NATIONAL FOREIGN TRADE COUNCIL, INC. IN SUPPORT OF RESPONDENTS

CECIL J. OLMSTEAD *
EDWARD J. KRAULAND
NANCY B. SUCKER
STEPTOE & JOHNSON
1330 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 429-3000
Attorneys for Amici Curiae

* Counsel of Record

WILKES - ROSS PRINTING CO., INC. - 783-0000 - WASHINGTON, D.C. 20001

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QUESTION PRESENTED

Whether, in light of relevant principles and rules of international law, Title VII should be construed to apply to local conduct occurring within the territory of another sovereign state.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	v
INTEREST OF *AMICI CURIAE*	1
SUMMARY OF ARGUMENT	3
ARGUMENT	7
I. THE EXTRATERRITORIAL APPLICATION OF TITLE VII IN THIS CASE WOULD BE CONTRARY TO ESTABLISHED INTERNATIONAL LAW PRINCIPLES AND RULES OF JURISDICTION	7
A. International Law is "Part of Our Law" and Must be Applied by this Court	7
B. Principles and Rules of International Law Limit a State's Jurisdiction to Regulate the Activities of its Nationals Abroad	8
C. International Conventions, Declarations, and Codes Regarding Employment Relations Recognize the Principle of Territorial Sovereignty and the Primacy of Local Regulation	10
D. Employment is Precisely the Type of Local Activity that States do not Regulate Extraterritorially, Even as to Their Nationals Employed in Foreign Countries	16
II. ACCORDING TO ESTABLISHED PRINCIPLES OF INTERNATIONAL LAW, IT WOULD BE UNREASONABLE TO APPLY TITLE VII TO CONDUCT IN FOREIGN COUNTRIES	18
A. International Law Requires "Reasonableness" in Extraterritorial Assertions of Jurisdiction	18

TABLE OF CONTENTS—Continued

	Page
B. Application of Title VII Abroad in this Case Would be Unreasonable	19
III. THE DOCTRINE OF COMITY AMONG STATES CALLS FOR RESTRAINT IN THIS INSTANCE	26
CONCLUSION	27
APPENDIX A	1a
APPENDIX B	6a

TABLE OF AUTHORITIES

Cases:	Page
Argentine Republic v. Amerada Hess Shipping Co., 109 S. Ct. 683, 691 (1989)	4
Boureslan v. Aramco, 857 F.2d 1014 (5th Cir. 1988), *adopted en banc*, 892 F.2d 1271 (5th Cir. 1990), *cert. granted*, 111 S. Ct. 40 (1990)	3
Boureslan v. Aramco, 892 F.2d 1271 (5th Cir. 1990), *cert. granted*, 111 S. Ct. 40 (1990)	3, 4
Callejo v. Bancomer, S.A., 764 F.2d 1101 (5th Cir. 1985)	20
Foley Brothers, Inc. v. Filardo, 336 U.S. 281 (1949)	4
Harris v. VAO Intourist Moscow, 481 F. Supp. 1056 (E.D.N.Y. 1979)	20
Laker Airways, Ltd. v. Sabena, Belgian World Airlines, 731 F.2d 909 (D.C. Cir. 1984)	8
Lauritzen v. Larsen, 345 U.S. 571 (1953)	19
McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10 (1963)	4-5
Murray v. The Schooner Charming Betsy, 6 U.S. (2 Cranch) 64 (1804)	5
Skiriotes v. Florida, 313 U.S. 69 (1941)	7, 9
Société Nationale Industrielle Aérospatiale v. United States District Court, 482 U.S. 522 (1987)	19, 26
Steele v. Bulova Watch Co., 344 U.S. 280 (1952)	8
Sumitomo Shoji America, Inc. v. Avagliano, 457 U.S. 176 (1982)	24
The Paquete Habana, 175 U.S. 677 (1900)	3, 7
Upton v. Iran, 459 F. Supp. 264 (D.D.C. 1978), *aff'd mem.*, 607 F.2d 494 (D.C. Cir. 1979)	20
Statutes and legislative materials:	
136 Cong. Rec. S17492 (daily ed. Oct. 27, 1990)	15
29 C.F.R. § 1606.1(c) (1971-1980)	23
Comprehensive Anti-Apartheid Act of 1986, Pub. L. No. 99-440, § 208, 100 Stat. 1087, 1097 (to be codified at 22 U.S.C. § 5035)	22
Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1332, 1391, 1441, 1602-1611 (1988)	20

TABLE OF AUTHORITIES—Continued

	Page
Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*..*passim*	
Omnibus Export Amendments Act of 1990, H. Rep. No. 101-944, 101st Cong., 2d Sess. § 128 1990)..	18
Foreign cases and statutes:	
Compagnie Européenne des Pétroles S.A. v. Sensor Nederland B.V., Judgment of Sept. 17, 1982, District Court at the Hague, *reprinted in* 22 I.L.M. 66 (1983)	18
Haughton v. Olau Line, Ltd., [1986] W.L.R. 504 (Ct. App. Mar. 7, 1986)	17
Libyan Arab Foreign Bank v. Bankers Trust Co., High Court of Justice, Queen's Bench, Commercial Court (Sept. 2, 1987)	18
Regina v. Foster, 103 C.L.R. 256 (Austl. 1959)	17
Walrave v. Association Union Cycliste Internationale, Case No. 36/74, 1975 Common Mkt. Rep. ¶ 8290 (CCH) (Dec. 12, 1974)	17
Saudi Arabian Labor and Workmen Law of 1969	6, 9, 16, 24, 25
United Kingdom Race Relations Act 1976 (1976 c. 74)	16
United Kingdom Sex Discrimination Act 1975 (1975 c. 65)	16
International materials:	
Code of Conduct on Transnational Corporations (draft text prepared by the Chairman of the Special Session on the Code of Conduct, May 31, 1990)	15
Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1985)	15
Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 34/180, 34 U.N. GAOR Supp. (No. 46) at 195, U.N. Doc. A/34/46 (1979)	11
Discrimination (Employment and Occupation) Convention (No. 111), 362 U.N.T.S. 31 (1958)..	5, 12

TABLE OF AUTHORITIES—Continued

	Page
International Covenant on Civil and Political Rights, G.A. Res. 2200, 21 U.N. GAOR Supp. (No. 16) at 52, 55-56, U.N. Doc. A/6316 (1966)..	11
International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200, 21 U.N. GAOR Supp. (No. 16) at 49-50, U.N. Doc. A/6316 (1966)	11
International Convention on the Elimination of All Forms of Racial Discrimination, G.A. Res. 2106, 20 U.N. GAOR Supp. (No. 14) at 47, U.N. Doc. A/6014 (1965)	11
OECD *Guidelines for Multinational Enterprises*, 15 I.L.M. 969 (1976)	14
Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, 17 I.L.M. 422 (1978)	13
U.N. Charter	11
Other authority:	
I. Brownlie, *Basic Documents on Human Rights* 257 (1971)	5
I. Brownlie, *Principles of Public International Law* 299 (1979)	8
Can. Lab. L. Rep. ¶ 1600 (CCH Canadian Ltd., 1987)	23
Henkin, *International Law as Law in the United States*, 82 Mich. L. Rev. 1555 (1984)	8
Gordon, *Extraterritorial Application of United States Economic Laws: Britain Draws the Line*, 14 Int'l Law. 151 (1980)	18
Human Rights—Status of International Instruments, U.N. Doc. ST/HR/5, U.N. Sales No. E.87.XIV.2 (1990)	17
7 Int'l Trade Rep. 1770 (Nov. 21, 1990)	18
International Labor Office, *Legislative Series, General Subject Index 1919-88* (1988)	16
Maier, *Resolving Extraterritorial Conflicts, or "There and Back Again,"* 25 Va. J. Int'l L. 7 (1984)	26

TABLE OF AUTHORITIES—Continued

	Page
Mann, *The Doctrine of Jurisdiction in International Law*, 111 Recueil des Cours 23 (Hague Academy of International Law, 1964)	9
F. Morgenstern, *International Conflicts of Labour Law* (1984)	16
OECD, *The OECD Guidelines for Multinational Enterprises* 76 (1986) (publication of the OECD)	14, 15
Restatement (Third) of the Foreign Relations Law of the United States (1987)	*passim*
Washington Post, Nov. 1, 1990, at F1	18
Yntema, *The Comity Doctrine*, 65 Mich. L. Rev. 9 (1966)	26

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

Nos. 89-1838, 89-1845

ALI BOURESLAN and
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Petitioners,

v.

ARABIAN AMERICAN OIL COMPANY, *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF *AMICI CURIAE* RULE OF LAW COMMITTEE AND THE NATIONAL FOREIGN TRADE COUNCIL, INC. IN SUPPORT OF RESPONDENTS

The Rule of Law Committee and the National Foreign Trade Council, Inc., submit this *amici curiae* brief in support of respondents Aramco and Aramco Services Company. Pursuant to Rule 37, counsel for *amici*, Steptoe & Johnson, has obtained and filed with the Clerk of the Court the written consent of Petitioners and Respondents to submit this brief.

INTEREST OF *AMICI CURIAE*

The Rule of Law Committee ("ROLC") is an informal, voluntary association of legal representatives from several major U.S.-based multinational corporations * with

* The current members are Bank of America, Bechtel Group, Inc., Chase Manhattan Bank, Chevron Corporation, E.I. Du Pont de

long-standing, worldwide business interests. The ROLC, which has been in existence for over 20 years, has frequently expressed its views on questions of United States and international law to courts of the United States, committees of Congress, and agencies of the Executive Branch.

The National Foreign Trade Council, Inc. ("NFTC"), is a New York not-for-profit corporation with more than 500 member firms concerned with international trade and investment. Interests of NFTC members account for over seventy percent of all U.S. exports and U.S. direct private investment abroad.

As the representatives of multinational companies which employ thousands of persons outside the United States, *amici* have a direct interest in the question presented to the Court. Whether and in what manner U.S. laws, such as Title VII of the Civil Rights Act of 1964, may apply to business activities occurring within another country is vitally important for American companies that operate in many countries having diverse social, cultural, and economic norms and that are subject primarily to local policies and laws.

Amici agree with *amici curiae* for petitioners that Title VII's antidiscrimination provisions reflect a deep, moral value of the United States. Unlike other *amici*, however, the ROLC and NFTC respectfully submit that this moral value is not a legally compelling consideration to the question before the Court. The question is not whether the values inherent in Title VII warrant its application to activities occurring abroad; rather, the fundamental question is whether, in light of relevant principles and rules of international law, Title VII should

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Nemours & Company, Exxon Corporation, Texaco Inc., and Mobil Oil Corporation. At the time of the alleged conduct giving rise to the complaint, affiliates of four ROLC members, namely Chevron, Exxon, Mobil Oil, and Texaco, held the stock of Arabian American Oil Co. ("Aramco").

be construed to apply to local conduct occurring within the territory of another sovereign state.

The Fifth Circuit, on two occasions, accurately noted that the sovereignty of other nations must be respected and that laws reflecting one state's values and norms, however important at home, cannot always be extended worldwide simply on the basis of nationality without infringing on the sovereignty of states having territorial jurisdiction. *Boureslan v. Aramco*, 857 F.2d 1014, 1017 (5th Cir. 1988), *adopted en banc*, 892 F.2d 1271, 1272-73 (5th Cir. 1990), *cert. granted*, 111 S. Ct. 40 (1990).

Amici ROLC and NFTC respectfully submit this *amicus* brief to set forth views to the Court on the principles and rules of international law which limit the authority of a state to exercise jurisdiction in the circumstances of this case.

SUMMARY OF ARGUMENT

This Court has long recognized that "[i]nternational law is part of our law, and must be ascertained and administered by the courts of justice. . . ." *The Paquete Habana*, 175 U.S. 677, 700 (1900). *Amici* ROLC and NFTC respectfully submit that extraterritorial application of Title VII would violate international law as expressed in international conventions, in principles of customary international law, and as evidenced in the practice of other countries in enacting domestic laws concerned with employment discrimination. Furthermore, even under the more recent and flexible approach to jurisdiction formulated in the Restatement (Third) of the Foreign Relations Law of the United States (1987) [hereinafter Restatement 3d] it would be unreasonable, and, therefore, violate international law, for the United States to assert jurisdiction over such conduct. The potential conflict with international legal principles and with the laws of foreign sovereigns, as well as the dramatic practical complexities of applying Title VII abroad, compel an af-

firmance of the Fifth Circuit decision. Moreover, the decision in the Fifth Circuit is consistent with the doctrine of international comity.

"The respect for the right of nations to regulate conduct within their own borders is a fundamental concept of sovereignty that is not lightly tossed aside." *Boureslan v. Aramco*, 892 F.2d 1271, 1272. Starting from this basic tenet of international law, the Fifth Circuit considered whether Congress had addressed "foreign sovereignty concerns" which would be implicated if the United States attempted to regulate local conduct occurring within the territory of another sovereign nation. It found that Congress had not addressed these concerns and, sitting as a panel and *en banc*, held that neither the text nor the legislative history of Title VII reflected the "necessary clear expression of congressional intent to extend its reach beyond our borders." *Id.* at 1274.

Respect for foreign sovereignty forms the basis of the long-established canons of construction which *amici* respectfully suggest should underlie the Court's analysis: first, the presumption against the extraterritorial application of a statute absent a clear expression of congressional intent, *Argentine Republic v. Amerada Hess Shipping Co.*, 109 S. Ct. 683, 691 (1989); *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 285 (1949);[1] second, the precedent that "an act of congress ought never to be construed to violate the law of nations if any other possible construction remains . . . ." *McCulloch v. Sociedad Nacional de*

[1] *Amici* will not elaborate further on the absence of any evidence of such intent in this case. This point has been thoroughly briefed in other submissions to the Court. *Amici* endorse the opinion of the Fifth Circuit that the negative inference—read into the statute by Petitioners based on the so-called alien employment exemption—is insufficient evidence of congressional intent to warrant extraterritorial application of a complex statute concerned with employment practices and based on U.S. social values. Indeed, the requisite intent must be express.

Marineros de Honduras, 372 U.S. 10, 21 (1963) (quoting *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804)); *see also* Restatement 3d § 114. These canons reflect the recognition that both international law and relations depend, in large part, on the concept of reciprocity—that is, the positions adopted by the United States regarding questions of jurisdiction may be reciprocally adopted by other countries *vis-a-vis* the United States. Thus, before it can be found that Congress acted in a manner inconsistent with the international principle of national sovereignty, Congress must clearly express its intention.

It is clear from international legal sources and state practice that employment relations are a matter left to regulation by each individual state within its sovereign jurisdiction. Many of the international conventions, declarations, and codes cited by other *amici* contain provisions prohibiting discrimination in employment. However, these same sources acknowledge the vast social, religious, and economic differences between nations and urge that action to prevent discrimination be taken by each nation within the confines of its sovereignty.

Moreover, review of the employment discrimination statutes collected by the International Labour Organization[2] demonstrates that the prevailing practice is not to reach conduct abroad and that some statutes expressly state that the law of the host country is exclusive, thereby precluding regulatory jurisdiction by other sovereigns

[2] The International Labour Organization is a specialized agency of the United Nations, comprised of representatives of workers, employers, and governments drawn from U.N. member states. It is especially concerned with issues of social justice pursued from a labor point of view and "has played a prominent and pioneer role in standard-setting" with regard to the interactions of governments, employers, and workers. I. Brownlie, *Basic Documents on Human Rights* 257 (1971). Among the many Conventions that the ILO has drafted as part of the process of establishing international labor standards is Convention 111 discussed *infra* section I(C).

over local conduct. In the instant case, the Saudi Labor and Workmen Law of 1969[3] governs all labor contracts and labor disputes in Saudi Arabia. *See* discussion, *infra*, at sections I(D) and II(B). Furthermore, several domestic tribunals have found that employment discrimination statutes do not apply extraterritorially. This is consistent with U.S. law as reported in the Restatement 3d,[4] which provides that the exercise of jurisdiction based on the "nationality principle" is limited and that the host state has jurisdiction to prescribe over predominantly local activities, such as industrial and labor relations. *Id.* § 414, comment c, at 271. *See also id.* §§ 402, at 237-42, 403, at 244-48.

Thus, extraterritorial application of U.S. law in these circumstances would clearly be contrary to international law. Absent an explicit congressional intent to apply U.S. law extraterritorially, the canons of construction, based on respect for international law, national sovereignty, and conflict avoidance in international relations, require restraint. Moreover, an analysis based on the factors prescribed in the Restatement 3d demonstrates that it would be "unreasonable," and therefore violate international law, for the United States to exercise jurisdiction in the instant case before this Court.[5]

On a more practical level, as local work forces throughout the world are comprised of employees from many different countries, the exercise of extraterritorial juris-

[3] Relevant portions of Saudi Arabia's Labor and Workmen Law are reproduced in appendix B.

[4] The Restatement 3d "reflect[s] [the] development in the law as given effect by the United States courts." Restatement 3d § 401, at 231 (Introductory Note).

[5] Even if the Court were to find that it would be "reasonable" for both the United States and Saudi Arabia to exercise jurisdiction over employment practices in Saudi Arabia, comity would require that the United States refrain from its exercise in this instance in favor of the territorial state. *See infra*, section III.

diction based on nationality, without clear guidance from lawmakers, risks significant disruption and reciprocal disrespect for the national sovereignty of our own country.

For these reasons, *amici* respectfully urge the Court to affirm the Fifth Circuit's decision below.

ARGUMENT

I. THE EXTRATERRITORIAL APPLICATION OF TITLE VII IN THIS CASE WOULD BE CONTRARY TO ESTABLISHED INTERNATIONAL LAW PRINCIPLES AND RULES OF JURISDICTION

Petitioner Equal Employment Opportunity Commission ("EEOC") argues that the extraterritorial application of Title VII to U.S. employers and employees overseas "does not give rise to significant conflicts with international norms or the law of foreign states." Brief for Petitioner EEOC, at 25. Citing *Skiriotes v. Florida*, 313 U.S. 69, 73 (1941), the EEOC asserts that the U.S. nationality of the parties confers prescriptive jurisdiction on the United States and that established limitations on extraterritorial regulation of U.S. nationals in a sovereign foreign country should be discounted. Brief for Petitioner EEOC, at 26.

Amici ROLC and NFTC respectfully submit that the EEOC ignores the extent of conflict involved in the extraterritorial application of Title VII. Such application would be inconsistent with established principles and rules governing the exercise of jurisdiction under international law.

A. International Law is "Part of Our Law" and Must be Applied by this Court

U.S. courts have long recognized that "[i]nternational law is part of our law, and must be ascertained and administered by the courts of justice. . . ." *The Paquete*

Habana, 175 U.S. at 700. "From the beginning, the law of nations . . . was considered to be incorporated into the law of the United States without the need for any action by Congress or the President, and the courts, State and federal, have applied it and given it effect as the courts of England had done." Restatement 3d § 111, at 41 (Introductory Note). *See also id.* § 111, at 42-43; Henkin, *International Law as Law in the United States*, 82 Mich. L. Rev. 1555 (1984).

B. Principles and Rules of International Law Limit a State's Jurisdiction to Regulate the Activities of its Nationals Abroad

The rules governing jurisdiction to prescribe law have been followed by U.S. and foreign tribunals and have "emerged as principles of customary [international] law." Restatement 3d § 401, at 231 (Introductory Note). Under the rules governing jurisdiction to prescribe, "[t]erritorality is considered the normal, and *nationality an exceptional*, basis for the exercise of jurisdiction." *Id.* § 402, comment b, at 238 (emphasis added); *Laker Airways, Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 935 (D.C. Cir. 1984) ("Territorality, not nationality, is the customary and preferred base of jurisdiction."); I Brownlie, *Principles of Public International Law* 299 (1979) (observing that especially in civil cases "courts are often reluctant to assume jurisdiction in cases concerning a foreign element and adhere to the territorial principle").

The corollary to this rule of jurisdiction is that the "nationality principle" must defer to the "territoriality principle," which authorizes the territorial state to regulate persons, things and activities *within its borders*. *See Steele v. Bulova Watch Co.*, 344 U.S. 280, 285-86 (1952) ("'[T]he United States is not debarred by any rule of international law from governing the conduct of its own citizens upon the high seas or even in foreign countries *when the rights of other nations* or their nationals *are not infringed*.'" (emphasis added) (quoting *Skiriotes v. Florida*, 313 U.S. 69, 73 (1941))); Mann, *The Doctrine of Jurisdiction in International Law*, 111 Recueil des Cours 23, at 50 (Hague Academy of International Law, 1964) ("[T]he mere fact that a person not resident in the legislating State is its national does not necessarily make him subject to such State's jurisdiction in all respects . . . . [T]he rights of other nations or their nationals must not be infringed.").

In the case presently before the Court, Saudi Arabia's regulatory jurisdiction is predicated on the parties being present and the conduct occurring within Saudi Arabia. Indeed, Saudi Arabian law by its terms applies exclusively to employment contracts and disputes occurring within its territory. *See* discussion, *infra*, sections I(C) and II(B). Here, United States jurisdiction is prescriptive, based solely on the parties' nationality. Yet, nationality alone is not a sufficient basis in all cases on which to prescribe rules to govern activities in a foreign country. *See* Restatement 3d § 402, comment a, at 238. In fact, jurisdiction based on the citizenship of a natural person has been exercised only "sparingly." Restatement 3d § 402, at 241 (Reporters' Note 1).[6]

As to the exercise of jurisdiction based on the nationality of a juridical person, or corporation, it too is limited. Such jurisdiction is not to be exercised when there are strong corporate connections with another state (for example, a state where the corporation has its head-

[6] Only in limited circumstances, such as in matters of allegiance (*e.g.*, military service, participation in judicial proceedings in the home country, or taxation of income earned by citizens abroad) has it been found reasonable for conduct to be regulated based on the nationality principle. Because such matters bear an exceptionally close relationship to the citizen and his state, decision-makers have found the nationality principle acceptable in such circumstances. And, it should be noted, these matters normally do not give rise to conflict with the policy or law of the territorial state.

quarters or conducts its operations) and the exercise of jurisdiction by the state of incorporation would be "unreasonable." *See, e.g.*, Restatement 3d § 403(1), at 244, discussed *infra* at section II. In this case, respondent Aramco for many years maintained its corporate headquarters in Saudi Arabia and conducted all its business activities in that country. *See* discussion, *infra*, section II(B).

The exercise of jurisdiction based on nationality (*i.e.*, the place of incorporation) has been limited to activities

> related to international transactions such as export and import, foreign exchange and credits, and transborder investment; but *not generally over predominantly local activities, such as industrial and labor relations*, health and safety practices, or conduct related to preservation or control of the local environment.

Restatement 3d § 414, comment c, at 271 (emphasis added). Alleged discrimination in an employer-employee relation occurring within Saudi Arabia cannot be viewed as an "international transaction," but is more properly considered a local labor activity that may not, absent a clear Congressional intent to the contrary, be regulated by the United States.

C. International Conventions, Declarations, and Codes Regarding Employment Relations Recognize the Principle of Territorial Sovereignty and the Primacy of Local Regulation

International agreements are sources of international law. Restatement 3d § 102(1)(b), at 24. *See also id.* §§ 102(3), at 24, 102, comment i, at 27. As agreements among nations, they impose obligations upon the parties. Moreover, certain multilateral conventions or codes can be evidence of or reflect customary international law which, as such, is binding on all states whether or not they are parties. *See* Restatement 3d § 102(3), at 24

(international agreements may "lead to the creation of customary international law when such agreements are intended for adherence by states generally and are in fact widely accepted"). Both conventional and customary international law have equal authority. *Id.*, comment j, at 27.

Beginning with the creation of the United Nations pursuant to its Charter, an international consensus has emerged against many forms of discrimination, including discrimination on the basis of race, gender, religion, and nationality.[7] The existence, however, of international norms against such conduct is the result of international cooperation and concerted action, rather than unilateral application of domestic laws across national borders.

The United Nations Charter stresses "international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion." U.N. Charter, art. 1(3). In implementing these Charter provisions, the United Nations serves as a "center for *harmonizing the actions of nations* in the attainment of these common ends." U.N. Charter, art. 1(4) (emphasis added). Thus, although the United Nations Charter seeks to promote an international consensus against discrimination, it also recognizes the bedrock international

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[7] *See, e.g.*, International Covenant on Civil and Political Rights, G.A. Res. 2200, 21 U.N. GAOR Supp. (No. 16) at 52, 55-56, U.N. Doc. A/6316 (1966); International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200, 21 U.N. GAOR Supp. (No. 16) at 49-50, U.N. Doc. A/6316 (1966); International Convention on the Elimination of All Forms of Racial Discrimination, G.A. Res. 2106, 20 U.N. GAOR Supp. (No. 14) at 47, U.N. Doc. A/6014 (1965); Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 34/180, 34 U.N. GAOR Supp. (No. 46) at 195, U.N. Doc. A/34/46 (1979).

legal principle of national sovereignty and the need to harmonize standards while respecting such sovereignty.

Multilateral instruments addressing corporate conduct in employment have clearly delineated the relationship between the international consensus against discrimination and the scope of domestic legislation. While specifying international standards for corporate conduct and protection of workers, these documents have also stressed the importance of respecting differences among nations and the sovereignty of each country. Contrary to the erroneous suggestion of *amicus* Lawyers Committee that national sovereignty is now of minimal importance,[8] these documents make clear that the issue of sovereignty is not losing its vitality or disappearing under the influence of increasing international transactions and multinational entities; rather, sovereignty is consciously being protected.

For example, the Discrimination (Employment and Occupation) Convention (No. 111), 362 U.N.T.S. 31 (1958), of the International Labour Organization ("ILO") addresses employment discrimination directly and stresses that the issue of discrimination is an international concern to be addressed on a *national basis*. Convention No. 111 is intended to protect workers against discrimination. Nonetheless, it declares that "[e]ach Member for which this Convention is in force undertakes to declare and pursue a *national policy* designed to promote, *by methods appropriate to national conditions and practice*, equality of opportunity and treatment in respect of employment and occupation, with a view to eliminating any discrimination in respect thereof." *Id.* at art. 2 (emphasis added). The ratification of this convention by 111 countries[9] reflects the

[8] Brief of *amicus* Lawyers' Committee For Civil Rights Under Law, at 16-18.

[9] The 111 countries that have ratified the Convention include not only Saudi Arabia, but also such countries as France, Germany, Italy, and the U.S.S.R. The United States has ratified neither the Discrimination (Employment and Occupation) Convention nor most of the other 169 ILO conventions.

consensus of the world community accepting the principle of national sovereignty and the primacy of territorial jurisdiction even within the context of the important and fundamental commitment to nondiscrimination in employment. As a party to the Convention, Saudi Arabia has expressed its agreement with these principles and entered into an undertaking to abide by widely accepted standards against discrimination within the context of its national policy.

As further evidence of customary international law, the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, 17 I.L.M. 422 (1978), demonstrates equal respect for standards of nondiscrimination and principles of sovereignty. The Declaration states:

> All governments should pursue policies designed to promote equality of opportunity and treatment in employment, with a view to eliminating any discrimination based on race, colour, sex, religion, political opinion, national extraction or social origin.

Id., para. 21, at 426. Yet,

> All the parties concerned by this Declaration should respect the sovereign rights of States, obey the national laws and regulations, give due consideration to local practices and respect relevant international standards.

Id., para. 8, at 424.

The Organization for Economic Cooperation and Development ("OECD")[10] has developed a code of conduct

[10] The purpose of the OECD is to promote policies designed to achieve high economic growth and employment, to contribute to world economic development, and to contribute to the expansion of world trade on a multilateral nondiscriminatory basis. The United States is a member of the OECD; Saudi Arabia is not.

for multinational enterprises—the OECD *Guidelines for Multinational Enterprises*, 15 I.L.M. 969 (1976) [hereinafter Guidelines]. These Guidelines reflect a dual concern for the sovereignty of nations and equality in employment. According to the OECD Guidelines, multinational enterprises are to respect the rights of employees and to ensure employment standards "not less favourable than those observed by comparable employers in the host country." *Id.* at 975. But these protections are to be realized "within the framework of law, regulations and *prevailing labour relations and employment practices, in each of the countries in which they operate. . . .*" *Id.* (emphasis added). The Guidelines, to which the United States subscribes, underscore the importance of sovereignty by acknowledging:

> Every State has the right to prescribe the conditions under which multinational enterprises operate within its national jurisdiction, subject to international law and to the international agreements to which it has subscribed. The entities of a multinational enterprise located in various countries are subject to the laws of these countries.

Id. at 970.

Concerned with the potential for conflict between laws that might be applied extraterritorially, a 1984 report of the OECD counselled cooperation in avoiding such conflict. OECD, *The OECD Guidelines for Multinational Enterprises* 75 (1986) (publication of the OECD). It urged Member states contemplating "action under existing legislation or other exercise of jurisdiction which may conflict with the legal requirements or established policies of another Member country and lead to conflicting requirements being imposed on multinational enterprises . . . [to] [h]ave regard to relevant principles of international law . . . [and] [t]ake fully into account the sovereignty and legitimate economic, law enforcement and other interests of other Member countries." *Id.*

at 75. To this end, the report urges cooperation rather than unilateral action. *Id.*[11]

In sum, these international conventions, declarations, and codes acknowledge the obligation of all nations to adopt standards of nondiscrimination, yet recognize that this process must be undertaken with respect for the sovereignty of individual nations and within the context of each nation's laws and policies.[12] Far from justifying extraterritorial application of domestic legislation, they seek to implement international norms within the ambit of domestic legislation of individual states. Increasing transnational circulation of goods, capital and labor has not led to a decline of concern for sovereignty, but rather has emphasized its significance in international law. The extraterritorial application of Title VII would transgress both the international consensus and the sovereignty of individual states.

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[11] Additionally, the latest proposed draft text of the United Nations Code of Conduct on Transnational Corporations (prepared by the Chairman of the Special Session on the Code of Conduct and dated May 31, 1990) echoes the concern for national sovereignty under international law: "An entity of a transnational corporation is subject to the laws, regulations and established administrative practices of the country *in which it operates*." Art. 8 (emphasis added). *See also* art. 14.

[12] In an area as important as the condemnation of torture, the Senate has expressed its intent that the international consensus be implemented in the context of U.S. domestic laws and policies. To this end, when giving its advice and consent to ratification of the U.N. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1985), the United States Senate included an express reservation that the Convention would not "restrict or prohibit the United States from applying the death penalty consistent with the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States." 136 Cong. Rec. S17492 (daily ed. Oct. 27, 1990). The recent instance of U.S. legislative action reflects our own government's continuing respect for national sovereignty.

D. Employment is Precisely the Type of Local Activity that States do not Regulate Extraterritorially, Even as to Their Nationals Employed in Foreign Countries

The practice of states is a primary source of customary international law. Restatement 3d § 102(2), at 24. The "practice of states" includes "diplomatic acts and instructions as well as public measures and other governmental acts and official statements of policy. . . ." *Id.*, comment b, at 25.

As reflected in domestic laws, the prevailing practice is to regulate employment discrimination pursuant to the territoriality principle of jurisdiction, even as to nationals employed abroad. The International Labour Organization lists 55 nations that have employment discrimination laws. International Labour Office, *Legislative Series, General Subject Index 1919-88* (1988). Rather than applying extraterritorially, many of these statutes expressly provide that they apply only within the territory of the regulating state. For example, the Race Relations Act and the Sex Discrimination Act of the United Kingdom expressly apply only to employment "at an establishment in Great Britain." Appendix A.[13]

In addition, a number of laws assert that the employment law of the territorial state is to be exclusive within its territorial boundaries. *See* F. Morgenstern, *International Conflicts of Labour Law* 34-35 (1984) (discussing, *inter alia*, territorial exclusivity of Argentine, Ecuadoran, Iraqi, Brazilian, and Mexican labor legislation). Most relevant for the Court's consideration in this case is the Saudi Arabian Labor and Workmen Law of 1969, which claims exclusive jurisdiction over all labor relations and disputes within Saudi Arabia. *See* appendix B, arts. 2, 174, 176.

[13] Similar legislation from Argentina, Gabon, India, Jamaica, Norway, and Spain is included in appendix A.

Moreover, courts of a number of states have applied their domestic discrimination laws only to conduct within the regulating state. In interpreting the U.K. Sex Discrimination Act, a British court has rejected the claim that the statute applied to conduct occurring in the channel between England and the European continent on a ship registered in Hamburg but owned by an English company. *Haughton v. Olau Line, Ltd.*, [1986] W.L.R. 504 (Ct. App. Mar. 7, 1986). The Australian courts have held that Australian labor laws apply only to activities substantially connected with Australian territory. *See Regina v. Foster*, 103 C.L.R. 256, 275 (Austl. 1959). The European Court of Justice has held that the European Communities' rules against discrimination apply only to activities within the member states. *See Walrave v. Association Union Cycliste Internationale*, Case No. 36/74, 1975 Common Mkt. Rep. (CCH) ¶ 8290 (Dec. 12, 1974).[14]

Thus, absent a clear congressional mandate, it would be contrary to accepted state practice for the EEOC or the courts to extend the scope of Title VII to activities outside the United States and within the territory of another sovereign nation.[15]

[14] The English texts of these foreign cases have been lodged with the Clerk of the Court.

[15] Given the absence of a clear Congressional mandate in this case, *amicus* Lawyers' Committee has sought to rely on the U.S. government's concern for its image among the world community as a basis for extending Title VII abroad. *See* Brief of Lawyers' Committee for Civil Rights Under Law, at 12 (characterizing Title VII as part of "a fundamental moral commitment by this Nation . . . repeatedly linked . . . to the international standing and relations of the United States."). However, the failure of the United States to ratify either the ILO Convention No. 111 or any of the United Nations human rights instruments relating to discrimination, *see Human Rights—Status of International Instruments* at 12-13, U.N. Doc. ST/HR/5, U.N. Sales No. E.87.XIV.2 (1990), seriously undermines the Lawyers' Committee's analysis.

II. ACCORDING TO ESTABLISHED PRINCIPLES OF INTERNATIONAL LAW, IT WOULD BE UNREASONABLE TO APPLY TITLE VII TO CONDUCT IN FOREIGN COUNTRIES

A. International Law Requires "Reasonableness" in Extraterritorial Assertions of Jurisdiction

Extraterritorial application of domestic laws—in particular by the United States—has bred resentment from other governments and, in some cases, spawned the enactment of foreign blocking statutes.[16] The principle of reasonableness has been adopted to govern the authority

[16] For example, the proposed Omnibus Export Amendments Act of 1990, H. Rep. No. 101-944, 101st Cong., 2d Sess., § 128 (1990), would have imposed restrictions on foreign subsidiaries of U.S. companies trading with Cuba. The Canadian government, which allows trade with Cuba, issued a blocking order demonstrating Canada's "determination to block measures that infringe Canadian sovereignty." Washington Post, Nov. 1, 1990, at F1. Under pressure from various countries, including Canada and the United Kingdom, President Bush vetoed the bill. 7 Int'l Trade Rep. 1770 (Nov. 21, 1990).

For other examples, *see also* Restatement 3d § 403, at 248-49 (Reporters' Note 1) (various state objections reflect the view that jurisdiction must be interpreted and applied *reasonably*); *id.* § 442, at 357-59 (Reporters' Note 4) (discussing blocking statutes enacted by Canada, the Netherlands, Great Britain, the Federal Republic of Germany, France, Norway, Australia, and South Africa "to counter litigation or investigation emanating from the United States"); Gordon, *Extraterritorial Application of United States Economic Laws: Britain Draws the Line*, 14 Int'l Law. 151 (1980).

Foreign courts have also reacted negatively to U.S. assertions of extraterritorial jurisdiction. *See, e.g., Libyan Arab Foreign Bank v. Bankers Trust Co.*, High Court of Justice, Queen's Bench, Commercial Court (Sept. 2, 1987) (U.K. court orders U.K. branch of U.S. bank to make payment to Libyan bank despite U.S. law prohibiting payment, characterizing transaction as one governed by British, not U.S., law); *Compagnie Européenne des Pétroles S.A. v. Sensor Nederland B.V.*, Judgment of Sept. 17, 1982, District Court at the Hague, *reprinted in* 22 I.L.M. 66, 71-72 (1983) (Dutch court characterizes U.S. Soviet pipeline regulations as a "restraint of trade," and concludes that U.S. assertion of jurisdiction over U.S. foreign subsidiary is "dubious").

of states to apply their domestic laws to conduct occurring abroad so as to accommodate the conflicting interests of states as well as affected private interests. Restatement 3d §§ 401, at 231 (Introductory Note), 403, at 244-48.

This principle is recognized through various judicial decisions in United States law and has emerged as a principle of international law as well. *Id.* § 403, comment a, at 245; *Société Nationale Industrielle Aérospatiale v. United States District Court*, 482 U.S. 522, 544-45 n.29 (1987) (in the context of discovery of documents located abroad, the Court held that U.S. law should be applied " 'consistent with the overall principle of reasonableness in the exercise of jurisdiction' ") (quoting Revised Restatement Draft No. 7 § 437, at 42 (Reporters' Note 5)). *Cf. Lauritzen v. Larsen*, 345 U.S. 571 (1953).

B. Application of Title VII Abroad in this Case Would be Unreasonable

Whether it is reasonable for the United States to exercise extraterritorial jurisdiction based on the nationality principle is to be evaluated considering the following non-inclusive list of factors:

(a) the link of the activity to the territory of the regulating state, *i.e.*, the extent to which the activity takes place within the territory, or has substantial, direct, and foreseeable effect upon or in the territory;

(b) the connections, such as nationality, residence, or economic activity, between the regulating state and the person principally responsible for the activity to be regulated, or between that state and those whom the regulation is designed to protect;

(c) the character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such

activities, and the degree to which the desirability of such regulation is generally accepted;

(d) the existence of justified expectations that might be protected or hurt by the regulation in question;

(e) the importance of the regulation to the international political, legal, or economic system;

(f) the extent to which the regulation is consistent with the traditions of the international system;

(g) the extent to which another state may have an interest in regulating the activity; and

(h) the likelihood of conflict with the regulation by another state.

Restatement 3d § 403(2), at 244-45. A consideration of these factors in the context of the instant case demonstrates that the extension of Title VII to a U.S. employer's activities occurring within the territory of another regulating state would be unreasonable.

The territorial links with the United States are weak in this case since none of the activity to be regulated occurred within the United States nor did the alleged unlawful conduct have a substantial, direct, and foreseeable effect in the territory of the United States. As courts have recognized in interpreting similar inquiries under the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1332, 1391, 1441, 1602-1611 (1988), activity affecting a U.S. citizen abroad does *not* have an effect in the United States. *See Callejo v. Bancomer, S.A.*, 764 F.2d 1101, 1111 (5th Cir. 1985); *Harris v. VAO Intourist Moscow*, 481 F. Supp. 1056 (E.D.N.Y. 1979); *Upton v. Iran*, 459 F. Supp. 264 (D.D.C. 1978), *aff'd mem.*, 607 F.2d 494 (D.C. Cir. 1979). Accordingly, consideration of the first factor of Section 403(2)(a) indicates it would be unreasonable to apply Title VII abroad.

In addition, there is an insufficient connection between the United States and the parties in this case to make

U.S. exercise of jurisdiction reasonable. In considering the link between the regulating state and the enterprise responsible for the activity, this factor requires more than a simple place-of-incorporation test. Rather, the overall "connections," including economic activity, should be considered. Aramco's incorporation in Delaware is a minor connection compared to other more significant considerations. At the time of the alleged conduct, Aramco's principal place of business and headquarters were in Dhahran, Saudi Arabia. All of Aramco's installations and operations were in Saudi Arabia. Its employees were predominantly Saudi nationals and other non-U.S. citizens. Because Aramco was charged by the Saudi government with development of the country's most important economic resource, the Saudi government closely monitored the planning and operations of Aramco. Thus, the connections between Saudi Arabia and Aramco were much stronger than the nominal connection between the United States and Aramco.

As for the connections between the regulating state and the person whom the regulations are designed to protect, petitioner Boureslan's U.S. citizenship is admittedly a primary factor to be considered. During the relevant time period, however, petitioner Boureslan's residency and all economic activity were in Saudi Arabia. Moreover, Saudi Arabia has had an antidiscrimination in employment law and procedure available to the petitioner,[17] which, *amici* contend, strengthens the connection between petitioner Boureslan and Saudi Arabia in this case.

The third factor also leads to the conclusion that the extraterritorial application of Title VII would be unreasonable. The character of the activity to be regulated—the relationship between an employer and its employee—is precisely the type of activity that generally, and in this instance specifically, is regulated exclusively by the host

[17] *See* discussion of conflict with Saudi law, *infra*, note 21 and accompanying text.

or territorial state. A state should not generally exercise extraterritorial jurisdiction "over *predominantly local activities*, such as industrial and *labor relations*, health and safety practices, or conduct related to preservation or control of the local environment." Restatement 3d § 414, comment c, at 271 (emphasis added).

As to the importance of such regulation, it is clearly an important U.S. policy to prohibit discrimination in employment. Yet, there is no clear statement in the text of Title VII or in its legislative history that Congress was concerned with such conduct abroad. As noted earlier, the U.S. government, as an OECD member, has endorsed the primacy of local law in this area. When Congress has intended to provide for extraterritorial application of U.S. law, as for example in the regulation of labor practices of American owned or controlled entities in South Africa, the statutory language has been clear and the legislative history unambiguous.[18]

As noted earlier, the practice of states is not to apply employment laws extraterritorially to their nationals. Documents reflecting the international consensus with regard to multinational enterprises and employment discrimination avoid extraterritorial application of employment laws in deference to the laws of the host or territorial country. *See* section I(D), *supra*. To do otherwise would require enterprises, such as Aramco, to ascertain and apply the laws of as many countries as are represented in their work forces.[19]

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[18] In the Comprehensive Anti-Apartheid Act of 1986, Congress expressly required U.S. nationals and companies employing more than 25 persons *in South Africa* to implement the Code of Conduct which included various principles of non-discrimination. Comprehensive Anti-Apartheid Act of 1986, Pub. L. No. 99-440, § 208, 100 Stat. 1087, 1097 (to be codified at 22 U.S.C. § 5035).

[19] In the case of Aramco's operations in Saudi Arabia, Aramco could have been subject to the employment discrimination laws of at least Saudi Arabia, the United States, the Philippines, the United

As for the existence of justified expectations, the silence of Congress on this issue provides no basis on which employees could expect that Title VII would apply to their employment abroad. In fact, for 10 years, the EEOC regulations extended Title VII solely to "all individuals, both citizen and noncitizens, domiciled or residing *in the United States*. . . ." 29 C.F.R. § 1606.1(c) (1971-1980) (emphasis added). Given the general practice of states to regulate the employer-employee on a territorial and often exclusive basis, employees cannot expect to carry their domestic employment discrimination laws with them when they work abroad.

The international agreements and guidelines discussed in section I(C), *supra*, and the prevalence of domestic laws regulating this issue indicate that eliminating discrimination in employment is an important international objective. As noted earlier, however, this objective is to be achieved in the context of regulation by the territorial state. The multilateral agreements in this area recognize and accept the differences among states that otherwise adhere to the generally accepted standards of nondiscrimination.

The political consensus reflected in Title VII is an American consensus and is not necessarily reflective of any other nation's political or social consensus on this aspect of labor relations. Indeed, some nations provide more extensive protection to employees. For instance, Canada prohibits discrimination on the basis of dependence on alcohol or drugs, race, national/ethnic origin, color, religion, age, sex, pregnancy/childbirth, marital status, criminal conviction, mental or physical disability, and family status. *See* Can. Lab. L. Rep. ¶ 1600 at 901-3 (CCH Canadian Ltd., 1987).[20]

Kingdom, the Netherlands, Canada, Jordan, Egypt, India, Pakistan, Sri Lanka, and Syria.

[20] This material has been lodged with the Clerk of the Court.

The extraterritorial application of Title VII would burden the international legal system by encroaching on individual nations' implementation of this international consensus. In addition, the extraterritorial application of Title VII would burden the international economic system by creating, within each foreign affiliate of a multinational enterprise that had employees of diverse citizenship, conflicting administrative and legal burdens. Thus, it is important to the international political, legal and economic system that Title VII *not* be applied in a unilateral and extraterritorial fashion.

With respect to the sixth factor, the extraterritorial application of Title VII would not be consistent with the traditions of the international legal system. As stated above, labor relations have been regarded as primarily a matter of local concern. Restatement 3d § 414, comment c, at 271. As discussed in section I(D), *supra*, the tradition is not to apply employment discrimination laws to conduct in another state. Thus, consideration of the tradition of the international legal system indicates that Title VII should not be construed to apply abroad.

Domestic employment discrimination laws demonstrate that most states clearly have an interest in regulating such matters within their territories. U.S. employment discrimination laws generally apply to U.S. and non-U.S. citizens working in the United States. *See, e.g., Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176 (1982). Saudi Arabia has a similar interest in regulating labor relations and employment activity within its borders. The extensive Saudi Arabian Labor and Workmen Law of 1969 occupies the field of employment in Saudi Arabia. It stipulates as its goal to develop and modernize the Saudi economy and to protect the integrity of the religious, moral, and social fabric of the society. It regulates all employment in Saudi Arabia including "any contract under which any person undertakes to work for the account of an employer . . . in consideration of a wage."

Art. 2. The extensive requirements of this law govern all aspects of the employment relationship between any employer and employee in Saudi Arabia. Therefore, the Saudi government's interest in this area of law has been made manifestly paramount.

Extraterritorial application of Title VII could conflict with several provisions of the Saudi Labor and Workmen Law of 1969. For example, the kind of work women may or may not perform and which hours they may work are strictly regulated to "protect" them from "hazardous" or "harmful" industries and nighttime workshifts. Arts. 160, 161. The provisions regarding maternity leave grant benefits far beyond those guaranteed by U.S. law. Arts. 160-62. The termination and complaint procedures in Saudi Arabia are quite different from Title VII. Saudi Arabian law establishes specific pre-conditions for discharge including "valid reason" and notice. The law provides for indemnity for wrongful discharge and for termination awards. Arts. 74, 83.

Finally, and of primary importance in the instant case, the extraterritorial application of Title VII would conflict with the provision of Saudi law giving it exclusive jurisdiction over all labor matters in Saudi Arabia. Art. 2. Exclusive jurisdiction over all labor disputes is explicitly reserved to Saudi "Labor and Settlement of Disputes Commissions" constituted by the Council of Ministers. Arts. 174, 176. Saudi Arabia's claim to exclusive jurisdiction over the resolution of all labor disputes within Saudi territory demonstrates an apparent policy that labor relationships are governed by Saudi local law.[21]

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[21] There is no indication that petitioner Boureslan pursued the remedies available to him under Saudi law prior to bringing an action against respondents in U.S. courts. Coupled with Saudi Arabia's adherence to international standards, as set forth in the ILO Convention (*see* discussion, section I(D), *supra*), it cannot be said that an appropriate remedy would not have been available to him under the law of the territorial state.

III. THE DOCTRINE OF COMITY AMONG STATES CALLS FOR RESTRAINT IN THIS INSTANCE

Comity among nations precludes finding that Title VII should be applied in the circumstances of this case. Restatement 3d § 403(3), at 245, provides:

> When it would not be unreasonable for each of two states to exercise jurisdiction over a person or activity, but the prescriptions by the two states are in conflict, each state has an obligation to evaluate its own as well as the other state's interest in exercising jurisdiction in light of all the relevant factors, [including those set out in] Subsection (2); a state should defer to the other state if that state's interest is clearly greater.

The balancing of interests called for in Restatement 3d § 403(3) reflects principles of comity under international law. *See* Maier, *Resolving Extraterritorial Conflicts, or "There and Back Again,"* 25 Va. J. Int'l L. 7 (1984); Yntema, *The Comity Doctrine*, 65 Mich. L. Rev. 9 (1966); *Société Nationale Industrielle Aérospatiale*, 482 U.S. at 541-46 (considering comity concerns in dispute regarding discovery of documents located abroad).

In this case, an evaluation of the competing interests of the two states using the factors set out in Restatement 3d § 403(2) leads to the conclusion that the interests of Saudi Arabia as the territorial state are "clearly greater" than those of the United States. To conclude that the United States has a lesser interest in no way implies that its interest is not significant. Rather, it indicates that, along with the substantial interest of the United States in the values underlying Title VII, this country has equally strong countervailing interests in demonstrating its respect for sovereignty, international law, and avoiding conflict. In these circumstances, the United States should defer to Saudi Arabia's clearly greater interests.

CONCLUSION

For the foregoing reasons, the decision of the Fifth Circuit should be affirmed.

Respectfully submitted,

CECIL J. OLMSTEAD *
EDWARD J. KRAULAND
NANCY B. ZUCKER
STEPTOE & JOHNSON
1330 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 429-3000
Attorneys for Amici Curiae
* Counsel of Record

APPENDICES

APPENDIX A

Excerpts from selected foreign statutes governing employment discrimination.

ARGENTINA

Decree No. 390, to approve a consolidated text of the rules governing contracts of employment. Dated 13 May 1976. (*Boletin Oficial*, 21 May 1976, No. 23410, p. 2), *reprinted in* ILO, *Legislative Series* 1976-Arg. 1 (1978).

Art. 3. *Cases in which the Act is applicable.* This Act shall apply to all matters relating to the legal capacity, rights and obligations of the parties, regardless of whether the contract of employment was concluded in Argentina or abroad, *on condition that it is performed in Argentina* (emphasis added).

Art. 17. *Discrimination prohibited.* This Act prohibits any form of discrimination between workers on grounds of sex, race, nationality, religion, political opinion, trade union membership or age.

GABON

Act No. 5-78, to institute a new Labour Code for the Gabonese Republic. Dated 1 June 1978. (*Journal Officiel*, 28 November 1978, No. 25, Extraordiary, p. 1), *reprinted in* ILO, *Legislative Series* 1978-Gab. 1 (1980).

Art. 7. The State shall guarantee equal wages for the same work or for work of equal value, without discrimination based upon nationality, sex or place of recruitment.

Art. 21. Irrespective of the place where a contract of employment is concluded and of the place where either of the parties is resident, *every contract of employment concluded for performance either wholly or in part in the territory of the Gabonese Republic shall be subject to the*

provisions of this Code: Provided that the foregoing shall not apply to workers brought to Gabon for temporary employment not exceeding three months (emphasis added).

INDIA

An Act to provide for the payment of equal remuneration to men and women workers and for the prevention of discrimination, on the ground of sex, against women in the matter of employment and for matters connected therewith or incidental thereto. No. 25 of 1976. Assented to 11 February 1976. (*Gazette of India*, Extraordinary, Part II, Section 1, No. 29, 12 February 1976, p. 189), *reprinted in* ILO, *Legislative Series* 1976-Ind. 1 (1977).

Art. 1. Short title, extent and commencement. (1) This Act may be called the Equal Remuneration Act of 1976.

Art. 2. *It extends to the whole of India* (emphasis added).

Art. 4. Duty of employer to pay equal remuneration to men and women workers for same work or work of a similar nature.

Art. 5. No discrimination to be made while recruiting men and women workers.

JAMAICA

An Act to eliminate discrimination between the sexes in the payment of remuneration for the doing of similar work and to provide for matters incidental thereto. No. 34 of 1975. Assented to 2 October 1975. *Reprinted in* ILO, *Legislative Series* 1975-Jam. 2 (1976).

Art. 1. *Short title and commencement.* This Act may be cited as the Employment (Equal Pay for Men and Women) Act of 1975.

Art. 3. *A person shall not be regarded for the purposes of this Act as employed in Jamaica if his employ-*

ment is wholly or mainly outside Jamaica (emphasis added); but

(a) employment on aircraft or hovercraft registered in Jamaica shall not be regarded for the purposes of this Act as employment outside Jamaica, unless it is wholly outside Jamaica;

(b) persons employed to work on board a ship registered in Jamaica, unless the employment is wholly outside Jamaica, are to be regarded for the purposes of this Act as employed in an establishment.

Art. 3. *Payment of equal pay for equal work.* (1) From and after the first day of January 1976 no employer shall, by failing to pay equal pay for equal work, discriminate between male and female employees employed by him in the same establishment *in Jamaica* (emphasis added).

NORWAY

Act respecting equality between the sexes. No. 45, Dated 9 June 1978. (*Norsk Lovtidend*, Part 1, 27 June 1978, No. 18, p. 395), *reprinted in* ILO, *Legislative Series* 1978-Nor. 1 (1979).

Art. 1. *Purpose of the Act.* This Act is intended to promote equality between the sexes and is specially aimed at improving the status of women.

The public authorities shall arrange for conditions ensuring equality between the sexes in all spheres of public life.

Women and men shall be afforded equal opportunities for training, employment and cultural and vocational development.

Art. 3. *General provisions.* Discrimination between women and men shall not be permitted.

The expression "discrimination" means any act placing women and men on a different footing because they

are of different sexes. It shall also be deemed to include any act whose practical effect is such that one sex is unreasonably placed at a disadvantage in relation to the other. . . .

Art. 5. *Equal wages for work of equal value.* Women and men engaged in the same activity shall have equal wages for work of equal value.

Art. 20. *Geographical scope of the Act.* This Act shall apply in Norway and Svalbard and on board Norwegian vessels and aircraft *in all spheres that are not subject to the sovereignty of any State* (emphasis added).

SPAIN

Act No. 8, to promulgate a Worker's Charter. Dated 10 March 1980. (*Boletin Oficial del Estado*, 14 March 1980, No. 64, p. 5799), *reprinted in* ILO, *Legislative Series* 1980-Sp. 1 (1981).

Art. 2. As a party to an employment relationship a worker shall have the right—

(c) to freedom from discrimination, when seeking employment or after having found employment, on grounds of sex, marital status, age (within the limits specified in this Act), race, social circumstances, religious or political ideas, membership or non-membership of a trade union, or language, *within the Spanish State* (emphasis added).

A worker shall likewise not be subject to discrimination on grounds of physical, mental or sensory handicap, if he has the necessary skills to do the job or engage in the employment in question . . . .

UNITED KINGDOM

The Race Relations Act 1976 (1976 c. 74).

Discrimination by employers

Art. 4. Discrimination against applicants and employees

(1) It is unlawful for a person, in relation to employment by him *at an establishment in Great Britain* (emphasis added), to discriminate against another . . .

(2) It is unlawful for a person, in the case of a person employed by him *at an establishment in Great Britain* (emphasis added), to discriminate against that employee . . .

The Sex Discrimination Act 1975 (1975 c. 65).

Discrimination by employers

Art. 6. Discrimination against applicants and employees

(1) It is unlawful for a person, in relation to employment by him *at an establishment in Great Britain* (emphasis added), to discriminate against women . . .

(2) It is unlawful for a person, in the case of a woman employed by him *at an establishment in Great Britain* (emphasis added), to discriminate against her . . .

APPENDIX B

Selected provisions from the Saudi Arabian Labor and Workmen Law of 1969. The complete text in English is at Attachment B to Respondent Aramco's brief in the Fifth Circuit.

ARTICLE 2

The provisions of this Law shall apply to:

(a) Any contract under which any person undertakes to work for the account of an employer under the latter's direction or control in consideration of a wage.

(b) Contracts of apprenticeship (Industrial indentures).

(c) Workmen of the Government, local authorities, charitable institutions, and public organizations.

ARTICLE 74

If the contract is cancelled for no valid reason, the party who is prejudiced by such cancellation shall be entitled to an indemnity to be assessed by the competent Commission, provided that such assessment shall take into account actual and contingent material and moral prejudice suffered by such party. . . .

ARTICLE 83

The employer may not cancel the contract without termination award, advance notice or indemnity except in the following cases, and provided that he gives the workman a chance to state his reasons for objecting to the cancellation:

1. If, during or by reason of the work, the workman has committed an assault against the employer or against any of his supervisors.

2. If the workman fails to fulfill the essential obligations arising from the labor contract, or to obey legitimate orders, or if, in spite of being warned, in writing, he deliberately fails to observe the instructions posted by the employer in a conspicuous place for the safety of the work and workmen.

3. If the workman is proved to have adopted a bad conduct or to have committed an act affecting honesty or honor.

4. If the workman has deliberately committed any act or negligence with intent to cause material loss to the employer, provided that the latter shall report the incident to the appropriate authorities within twenty-four hours from the time of its coming to his knowledge.

5. If it is proved that the workman had resorted to forgery in order to obtain the job.

6. If the workman is hired on probation.

7. If the workman absents himself without valid reason for more than twenty days in one year or for more than ten consecutive days, provided that discharge shall be preceded by a warning in writing by the employer to the workman after ten days' absence in the first case and five days' absence in the second.

8. If it is proved that, without permission from the person supervising his treatment, the workman has left the hospital or any place provided for his treatment. This shall not prejudice his right to such compensation as he is entitled to under the provisions on injuries and compensations set forth in the Social Insurance Law.

9. If it is proved that the workman has divulged the industrial and commercial secrets of the work in which he is engaged.

ARTICLE 160

Adolescents, juveniles and women may not be employed in hazardous operations or harmful industries, such as power-operated machinery, mines, quarries and the like. The Minister of Labor shall, by decision, designate the occupations and operations that are regarded as harmful to health, or are apt to expose women, juveniles and adolescents to given hazards requiring that their employment in such occupations or operations be prohibited or restricted by special conditions. In no case may men and women commingle in the place of work or in the accessory facilities or other appurtenances thereto.

ARTICLE 161

Adolescents, juveniles and women may not be employed during the night time which covers an interval of at least eleven hours between sunset and sunrise, except in the cases to be determined by decision of the Minister of Labor in respect of non-industrial occupations and in cases of force majeure.

ARTICLE 162

Juveniles and adolescents may not be employed for a period exceeding six hours a day, and the exceptions provided for in Articles 150 and 152 of this Law shall not apply to them.

ARTICLE 174

The Primary Commission for Settlement of Disputes shall have exclusive jurisdiction to:

First, Render final decisions on:

a. Labor disputes, the value of which does not exceed three thousand riyals.

b. Disputes relating to the stay of execution of decisions to terminate workmen, which are filed in accordance with the provisions of this Law.

c. Disputes relating to the imposition of fines or requests for exemption from such fines.

Second: Render decisions of first instance on:

a. Labor disputes, the value of which exceeds three thousand riyals.

b. Disputes pertaining to Labor injuries whatever the amount involved may be.

c. Disputes pertaining to termination of service.

ARTICLE 176

The Supreme Commission shall have exclusive jurisdiction to render final and definitive decisions in all disputes referred to it on appeal and shall likewise be conpetent to impose upon the violators of the provisions of this Law the penalties prescribed herein.

BEST AVAILABLE COPY

QUESTION PRESENTED

Does Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* -- both its substantive and its administrative requirements -- apply to employers of U.S. citizens overseas?[1]

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[1] Petitioners state the question as whether "Title VII prohibits employment discrimination outside the United States by an American corporation against an American citizen." EEOC Brief at i. Their arguments, however, if valid, would make Title VII applicable also to the conduct of foreign corporations, whether or not subsidiaries of American firms, vis-a-vis their American employees, and the EEOC's most recent policy statement in this area says that foreign companies are subject to Title VII in their dealings with Americans. Policy Statement No. N-915.033, EEOC Compl. Man. (BNA), at 605:0055 (Sept. 2, 1988). Therefore, we restate the question to indicate the full scope of the issue before the Court.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iv

INTEREST OF THE AMICUS 2

STATEMENT OF THE CASE 4

SUMMARY OF ARGUMENT 5

ARGUMENT 7

I. LEGISLATION SHOULD BE GIVEN EXTRATERRITORIAL EFFECT ONLY WHEN CONGRESS CLEARLY EXPRESSES ITS AFFIRMATIVE INTENTION TO GIVE THE LEGISLATION SUCH EFFECT . 7

A. The *Benz* rule is consistent with international law 8

B. The *Benz* rule also is consistent with other considerations of public policy . . 10

II. CONGRESS HAS NOT CLEARLY EXPRESSED AN AFFIRMATIVE INTENTION TO GIVE TITLE VII EXTRATERRITORIAL EFFECT 11

III. THERE ARE SOUND PUBLIC POLICY REASONS FOR CONGRESS NOT TO GIVE TITLE VII EXTRATERRITORIAL EFFECT 13

A. Applying Title VII overseas would encourage companies to discriminate against American citizens in their hiring 15

B. Applying Title VII overseas would place American firms at a competitive disadvantage relative to foreign firms . . 16

IV. AFFIRMING THE JUDGMENT BELOW WILL NOT PROMPT AN EXPLOSION OF DISCRIMINATION BY AMERICAN COMPANIES OPERATING OVERSEAS . . 17

CONCLUSION 18

TABLE OF AUTHORITIES

Page

Cases:

American Banana Co. v. United Fruit Co., 213 U.S. 347 (1909) 7
Benz v. Compania Naviera Hidalgo, S.A., 353 U.S. 138 (1957) . . . . . *passim*
Blackmer v. United States, 284 U.S. 421 (1932) 7
City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) 2
Firefighters Local No. 1784 v. Stotts, 467 U.S. 561 (1984) 2
Foley Bros., Inc. v. Filardo, 336 U.S. 281 (1949) 5, 7, 8
McCulloch v. Sociedad Nacional de Marineros, 372 U.S. 10 (1963) 7, 8
Northern Pacific Railway v. United States, 356 U.S. 1 (1958) 10
Patterson v. McLean Credit Union, 109 S.Ct. 2363 (1989) 2
Steele v. Bulova Watch Co., 344 U.S. 280 (1952) 11
Vermilya-Brown Co. v. Connell, 335 U.S. 377 (1948) 12

Statutes:

15 U.S.C. § 1127 11
29 U.S.C. § 152(6) 11
42 U.S.C. § 2000e, *et seq.* . . . . . *passim*
42 U.S.C. § 2000e(b) 11
42 U.S.C. § 2000e(g) 11
42 U.S.C. § 2000e(h) 11
42 U.S.C. § 2000e-1 12

42 U.S.C. § 2000e-2(e) 3

Miscellaneous:

G. Becker, *Economics of Discrimination* (1957) 14
H. Belz, *Affirmative Action from Kennedy to Reagan: Redefining American Equality* (1984) 2
EEOC Policy Statement No. N-915.033, EEOC Compl. Man. (BNA), at 605:0055 (Sept. 2, 1988) . . . . . i, 16
H.R. 4453, 81st Cong., 1st Sess. (1949) 12
Office of Program Operations, EEOC, *Annual Report for Fiscal Year 1989* 15
Restatement (Third) of Foreign Relations Law of the United States § 402 (1986) 8
T. Sowell, *Markets and Minorities* (1981) 14
U.S. Commission on Civil Rights, *Selected Affirmative Action Topics in Employment and Business Set-Asides*, (1985) 16
W. Williams, *The State Against Blacks* (1982) 10

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1990

Nos. 89-1838 and 89-1845

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Petitioner,

v.

ARABIAN AMERICAN OIL CO., ET AL.
Respondents.

ALI BOURESLAN,

Petitioner,

v.

ARABIAN AMERICAN OIL CO., ET AL.
Respondents.

On Writs of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

BRIEF OF *AMICUS CURIAE* THE WASHINGTON LEGAL FOUNDATION IN SUPPORT OF THE RESPONDENTS

INTEREST OF THE *AMICUS*[2]

The Washington Legal Foundation ("WLF") is a national nonprofit public interest law center with more than 120,000 members throughout the United States. WLF engages in litigation to promote and protect the free enterprise system, and the economic and civil liberties of individuals and businesses. WLF has appeared before this Court on numerous occasions in Title VII and other civil rights cases. *E.g.*, *Firefighters Local No. 1784 v. Stotts*, 467 U.S. 561 (1984); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); and *Patterson v. McLean Credit Union*, 109 S.Ct. 2363 (1989). In addition, WLF has published a monograph, *Affirmative Action from Kennedy to Reagan: Redefining American Equality* (1984), by Professor Herman Belz, which makes the case that the Department of Labor's Office of Federal Contract Compliance Programs has not resulted in the empployment of more minorities in the private sector, but has imposed an enormous cost on businesses just to establish and administer compliance programs.

Consistent with this program, WLF abhors irrational employment discrimination,[3] such as that prohibited by

---

[2] Counsel for all parties have consented to the filing of this *amicus* brief. Their written consents are on file with the Clerk of this Court.

[3] We use the term "irrational discrimination" when referring to the types of discrimination prohibited by Title VII. Taken literally, "employment discrimination" would mean all differentiation by an employer between employees or applicants. Obviously, however, some employment discrimination is desirable and rational, such as differentiation between competent and incompetent employees, or between qualified and unqualified applicants. Indeed, Title VII itself recognizes that discrimination on the basis of some of the factors it generally prohibits -- sex, religion or national origin -- (continued...)

Title VII of the Civil Rights Act of 1964. WLF therefore supports rational government action to prevent and eliminate irrational discrimination. WLF also recognizes, however, as we discuss below, that free and unfettered competition among employers tends to avoid or eliminate irrational discrimination. Moreover, WLF is concerned because government action intended to prevent or eliminate irrational discrimination may sometimes have the opposite effect -- it may, in fact, encourage such discrimination instead. Therefore, it is essential that the courts interpret the civil rights laws in a way that combats irrational discrimination rather than promotes it. In particular, since Title VII regulates the market for labor, it is important to employ economic analysis to ensure that the law is not unintentionally and unnecessarily interpreted in a way that causes it to have effects contrary to its purposes.

In this brief, we hope to bring to the attention of the Court relevant matter that has not already been raised by the parties or other *amici curiae*. Among other things, we will explain why reversing the judg-

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[3](...continued)
can sometimes be rational: the statute provides that such discrimination is lawful when one of these factors "is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise." 42 U.S.C. § 2000e-2(e). On the other hand, discrimination on the basis of race or color is never rational, and is never justifiable as a matter of law under Title VII.

The courts have construed the "bona fide occupational qualification" defense very narrowly, often at the urging of the Equal Employment Opportunity Commission or the *amici* supporting the Government's position here. It is therefore rather surprising that the EEOC and those *amici* are now arguing that a broadening of this defense would be appropriate to protect against the problems that extraterritorial application of Title VII would necessarily entail. In fact, such a broadening would not resolve the key problems, and could have deleterious effects at home.

ment of the court below and applying Title VII to conduct overseas would tend to induce discrimination that should be abhorrent to all, and that would run contrary to the very purposes of Title VII. WLF brings a unique perspective to this case because it brings an economic perspective to the fight against racial and other irrational discrimination, and has no other interest in the resolution of this case, political or economic.

STATEMENT OF THE CASE

Ali Boureslan is a Lebanese-born, naturalized American citizen, and a Muslim. He was employed by Aramco Services Company ("ASC"), a Delaware corporation, in July 1979 as a cost engineer, and worked for ASC in the United States. ASC was then a subsidiary of Arabian American Oil Company ("Aramco"), also a Delaware corporation. At Boureslan's request, in November 1980 he transferred to work for Aramco as a cost engineer in Saudi Arabia. In February 1981 he was assigned to be a construction engineer with Aramco in Saudi Arabia.

Boureslan began receiving poor performance reviews in early 1982. In February 1983 he filed a grievance with the company, alleging that his direct supervisor at the time, an Englishman, had mistreated and harassed him on account of Boureslan's race, national origin and religion. Aramco apologized to Boureslan, and disciplined and demoted the supervisor, to a point where he ultimately resigned. The company also transferred Boureslan to its design group. Boureslan continued to receive poor performance evaluations, and his employment with Aramco was terminated effective June 16, 1984.

Boureslan filed charges against Aramco with the U.S. Equal Employment Opportunity Commission ("EEOC"), alleging that Aramco had discriminated

against him on the basis of race, national origin and religion while he was employed in Saudi Arabia. Before the EEOC ruled on the merits of his charges, Boureslan filed suit against Aramco and ASC in the United States District Court for the Southern District of Texas, alleging violations of Title VII and state law. Aramco and ASC moved to dismiss the complaint for, *inter alia*, lack of subject matter jurisdiction. The district court granted this motion, a divided panel of the United States Court of Appeals for the Fifth Circuit affirmed the district court's judgment, and that court again affirmed the dismissal after rehearing *en banc*. The district court and the court of appeals applied the presumption that statutes do not have extraterritorial application, *Foley Bros., Inc. v. Filardo*, 336 U.S. 281 (1949), and found no clear indication that Congress intended to give Title VII extraterritorial effect. On petitions by Boureslan and the EEOC (which intervened during the court of appeals' *en banc* review), this Court issued writs of certiorari on October 1, 1990.

SUMMARY OF ARGUMENT

It is a long-standing principle of American law that a federal statute will not be given extraterritorial effect unless Congress clearly expresses its affirmative intention that the statute be given such effect. This principle is consistent both with international law -- by reducing the likelihood that persons will be subject to dual or conflicting regulation -- and with common sense. There is not, however, any clear statement by Congress of an affirmative intention to give Title VII extraterritorial effect. To the contrary, by modeling Title VII's jurisdictional provisions upon those of the other federal labor laws -- which do *not* apply overseas -- Congress indicated that Title VII, too, should not apply abroad.

Petitioners urge the Court to draw a negative inference from the "alien exemption" provision of Title VII. This provision, however, is subject to at least two different plausible explanations, only one of which would support the proposed inference, and probably the most that can be said about this provision is that no one will ever know for sure why it was put into Title VII. This can hardly serve as the clear expression of affirmative Congressional intent necessary to support extraterritorial application of Title VII.

Petitioners and the *amici* supporting them also suggest that it would be irrational for Title VII not to be given extraterritorial effect -- that Congress must have intended this because sound public policy demands it. In fact, however, there are sound public policy reasons why Congress might not want to apply Title VII overseas. For one thing, since aliens employed overseas, even by American companies, definitely do not have standing under Title VII, if Americans had such standing, companies overseas would have a strong incentive to discriminate against Americans by refusing to hire them at all -- a result that Congress probably would not want to secure. Moreover, if Title VII, and all the administrative costs it brings with it, would apply only to American companies abroad, those companies would be placed at a significant competitive disadvantage relative to foreign firms -- another result that Congress might prefer to avoid.

Of course, despite these effects, Congress could decide to apply Title VII overseas, but they illustrate the wisdom of the rule that Congress must address this question directly. This Court should not rely upon a negative inference from a provision whose true meaning is unknown, and probably unknowable.

Finally, *amici* supporting the petitioners argue that if Title VII is not given extraterritorial effect, American companies overseas will go on a wild rampage of

racism, sexism, and every other type of conduct that Title VII is meant to prohibit. This is nonsense. Employment discrimination by American companies against Americans overseas has not been a major problem, and the hypothetical conduct these *amici* conjure up is utterly implausible.

The judgment of the court of appeals should therefore be affirmed.

ARGUMENT

I. LEGISLATION SHOULD BE GIVEN EXTRATERRITORIAL EFFECT ONLY WHEN CONGRESS CLEARLY EXPRESSES ITS AFFIRMATIVE INTENTION TO GIVE THE LEGISLATION SUCH EFFECT.

Petitioners concede, as they must, "that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States." *Foley Bros., Inc. v. Filardo*, *supra*, 336 U.S. at 285, citing *Blackmer v. United States*, 284 U.S. 421, 437 (1932). *See also American Banana Co. v. United Fruit Co.*, 213 U.S. 347, 357 (1909). Petitioners ignore, however, this Court's rulings that to find extraterritorial applicability "there must be the affirmative intention of the Congress clearly expressed." *Benz v. Compania Naviera Hidalgo, S.A.*, 353 U.S. 138, 147 (1957). *Accord*, *McCulloch v. Sociedad Nacional de Marineros*, 372 U.S. 10, 21-22 (1963) (quoting *Benz*, *supra*); *Foley Bros., Inc. v. Filardo*, *supra*, 336 U.S. at 286 ("An intention . . . to regulate labor conditions which are the primary concern of a foreign country should not be attributed to Congress in the absence of a clearly expressed purpose.") Instead, petitioners would have the Court give extraterritorial effect to Title VII on the basis of a negative inference from the so-called

"alien exemption" provision of Title VII, 42 U.S.C. 2000e-1. The Court should decline this invitation to reverse the rule of *Foley Bros.*, *Benz* and *McCulloch* that a statute will not be given extraterritorial effect unless Congress clearly expresses an affirmative intention that the statute have such effect.

A. The *Benz* rule is consistent with international law.

International law recognizes two general bases for the exercise of jurisdiction by a nation: territoriality and nationality. *Restatement (Third) of Foreign Relations Law of the United States* (hereinafter "*Restatement*") § 402 (1986). Briefly stated, the territorial principle permits a state to prescribe law with respect to conduct or persons within its territory. The nationality principle permits a state to prescribe law with respect to its nationals whether they are within or without its territory.

"Territoriality is considered the normal, and nationality an exceptional, basis for the exercise of jurisdiction." *Id.*, comment b. Territoriality is "by far the most common basis for the exercise of jurisdiction . . . and it has generally been free from controversy." *Id.*, comment c. Controversy does arise, however, in connection with a particular subcategory of the territorial principle: the effects principle. It is the position of the United States, and this is reflected in the *Restatement*, that a state may prescribe law with respect to conduct outside its territory that has substantial effect within its territory, even if that conduct is lawful where carried out. *Id.*, comment d. Understandably, not all other countries accept this position.

In addition to this potential for controversy under the effects principle, there is obviously great opportunity for conflict when the nationality principle is applied to

regulate conduct subject to another state's regulation pursuant to the territoriality principle. As a matter of international law, a state *may* exercise jurisdiction under the nationality principle even if another state is exercising jurisdiction under the territorial principle as long as the prescriptions of the two states do not conflict. Thus, a person may have to comply with two different rules. And as a matter of United States law, statutes *may* be given extraterritorial effect even if to do so would violate international law. International law requires, however, and common sense suggests, that states not act unreasonably, and not impose dual or conflicting obligations upon persons without careful consideration of its implications.

The *Benz* rule is thus consistent with international law and common sense. It does not take away from Congress the power to employ the nationality principle to impose dual, or even conflicting, obligations upon American citizens abroad. All it requires is that Congress clearly and affirmatively express its intention to achieve such a result before a statute will be interpreted to impose it. Petitioners here argue that Title VII can be given extraterritorial effect on the basis of either the effects principle or the nationality principle. Even assuming *arguendo* this is correct -- and we have serious reservations about whether the effects principle is legitimately applicable here -- particularly because those are the two principles involved, it is appropriate for the Court to adhere to the *Benz* standard and not give Title VII extraterritorial effect absent a clear, affirmative statement by Congress that the statute should be applied overseas.

B. The *Benz* rule also is consistent with other considerations of public policy.

As this Court has recognized in another context, as a general rule:

> the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions.

Northern Pacific Railway v. United States, 356 U.S. 1, 4 (1958). This is as true of labor markets as it is of other markets.

Sometimes, it is appropriate to regulate markets, to correct or compensate for some market failure. It is easy, however, to regulate in a fashion that makes things worse than they were before the regulation began. Moreover, the same type of regulation may have very different effects under different circumstances. For example, the very principle underlying Title VII's drive to promote equal employment opportunity -- equal pay for equal work -- has been applied elsewhere, such as in South Africa, to deny equal employment opportunity. W. Williams, *The State Against Blacks* 39-40 (1982).

Therefore, it is critically important for Congress to study carefully, and be familiar with, any market it decides to regulate. Congress will always be less familiar with conditions abroad than with conditions at home. Therefore, from this perspective, too, it is appropriate to require, as *Benz* does, that Congress make its intention plain whenever it intends to apply a regulatory scheme overseas.

II. CONGRESS HAS NOT CLEARLY EXPRESSED AN AFFIRMATIVE INTENTION TO GIVE TITLE VII EXTRATERRITORIAL EFFECT.

Petitioners try to find indications of Congress' intent to apply Title VII overseas in two provisions of the statute. Neither, however, rises to the level required by *Benz*: "the affirmative intention of the Congress clearly expressed." Indeed, one indicates that Congress did *not* want Title VII to apply abroad.

Petitioners first argue that Title VII's definition of an "employer", in 42 U.S.C. § 2000e(b), is broad enough to include firms overseas. The EEOC asserts that Title VII's jurisdictional provisions are similar to those of the Lanham Act, which reach behavior outside the United States. *Steele v. Bulova Watch Co.*, 344 U.S. 280 (1952). This simply is not correct.

In *Steele*, this Court relied upon the Lanham Act's definition of "commerce" as "all commerce which may lawfully be regulated by Congress." *Id.* at 284, quoting 15 U.S.C. § 1127. Behavior by American companies overseas "may lawfully be regulated by Congress," and thus the Lanham Act clearly expresses an intention to reach such conduct. Title VII, however, does not use such all-encompassing language. Instead, Title VII regulates the behavior of employers, which it defines as "person[s] engaged in an industry affecting commerce." 42 U.S.C. § 2000e(b). An industry affecting commerce is "any activity, business or industry in commerce or in which a labor dispute would hinder or obstruct commerce . . . and includes any activity or industry 'affecting commerce' within the meaning of the Labor-Management Reporting and Disclosure Act of 1959." 42 U.S.C. § 2000e(h). And "commerce" is defined in Title VII, at 42 U.S.C. § 2000e(g), in terms virtually identical to the definition of "commerce" for purposes of the labor laws, at 29 U.S.C. § 152(6). Thus,

Title VII was designed to have the same reach as the federal labor laws -- the very statutes that were the subject of *Benz* and *McCulloch*, and that this Court held do *not* have extraterritorial effect. Since both *Benz* and *McCulloch* were decided before Title VII was enacted, Congress' deliberate decision to pattern Title VII's jurisdictional reach upon that of the labor laws indicates a deliberate Congressional decision *not* to give Title VII extraterritorial effect.

Petitioners also argue strenuously that Title VII's "alien exemption" clause, 42 U.S.C. § 2000e-1, necessarily implies that the statute should otherwise have extraterritorial effect. Even if this were correct, the sort of negative inference necessary to reach this conclusion would not constitute the clear expression of an affirmative intention required by *Benz*. Moreover, this provision does not necessarily imply any such thing.

The alien exemption provides that Title VII "shall not apply to an employer with respect to the employment of aliens outside any State." Petitioners argue that this provision would be superfluous if Title VII did not otherwise apply to employers with respect to the employment of Americans in foreign countries. Once again, they are simply wrong: the alien exemption would deny standing under Title VII to aliens employed in many U.S. possessions. While this may not seem like a major issue today, it was at the time the verbiage of the alien exemption entered the Congressional lexicon.

The alien exemption first appeared in a fair employment bill introduced by Rep. Adam Clayton Powell in April 1949. H.R. 4453, 81st Cong., 1st Sess. Just a year earlier, this Court had held that leased military bases in foreign nations constituted "possessions" for purposes of the Fair Labor Standards Act, *Vermilya-Brown Co. v. Connell*, 335 U.S. 377

(1948), thus making aliens employed on such bases entitled to all the benefits of that Act. Many members of Congress were upset by this result. Congressman Powell, knowing that it would be enormously difficult to enact any sort of federal fair employment law, may very well have been trying to avoid a fight over the civil rights of aliens employed in U.S. possessions.

The EEOC has suggested a different motivation for Congressman Powell, and the truth may be something entirely different. But the very fact that the best we can do is speculate about the origins and purpose of the alien exemption underscores the point that this provision does not constitute a clear expression of an affirmative intention by Congress to give Title VII extraterritorial effect.

III. THERE ARE SOUND PUBLIC POLICY REASONS FOR CONGRESS NOT TO GIVE TITLE VII EXTRATERRITORIAL EFFECT.

Petitioners and the *amici* supporting them seem to suggest that Congress must have intended to give Title VII extraterritorial effect, because eliminating employment discrimination is a critically important public policy, and there could not be any good reason for Congress not to apply that policy overseas. We would therefore like to suggest two reasons why Congress might choose not to apply Title VII overseas. Again, we do not question the power of Congress to do so. Nor are we suggesting that the Court should weigh the alternatives and decide which would be the better policy. Rather, we simply wish to demonstrate that there is a policy decision to be made -- and we respectfully urge the Court to leave that policy decision to the Congress.

Giving Title VII extraterritorial effect would not mean just that companies operating overseas could not

discriminate on the basis of race, color, sex, religion or national origin in their dealings with American employees. It would mean also that those companies would be subject to the full administrative panoply of Title VII -- and the very substantial costs that come with it. Even with respect to domestic employers, Congress exempted from Title VII's coverage all employers with less than 15 employees. No one would doubt that an employee discriminated against because of his race by a small company is just as wronged as his counterpart discriminated against by a larger concern. Congress exempted small companies not because there is less discrimination by them, but because the costs incurred in defending against meritless charges, and for establishing compliance programs and the like, would be unduly burdensome for small concerns.

Not engaging in irrational discrimination does not impose costs upon a company. To the contrary, when an employer engages in irrational discrimination it imposes costs upon itself that place it at a competitive disadvantage relative to non-discriminating employers. Discriminating employers reduce the supply of labor available to themselves, and it is a fundamental axiom of economics that price (here, the cost of labor) goes up as supply goes down. T. Sowell, *Markets and Minorities* 34-51 (1981); G. Becker, *Economics of Discrimination* (1957). However, investigations by the EEOC, and private lawsuits under Title VII, do impose very substantial costs upon employers, even if no discrimination has occurred.

If all, or even most, EEOC investigations found discrimination, these costs might be of little concern -- they might even be outweighed by the savings the targets would reap by ending their discrimination. In fact, however, only a small fraction of EEOC investigations find discrimination. For example, in its fiscal year 1989, the latest for which data are available,

the EEOC determined the merits of 66,209 charges that had been filed with it, and found merit in only 11,156 (16.8%) of those charges. Office of Program Operations, EEOC, Annual Report for Fiscal Year 1989, at B.2. But the employers who were the targets of the 55,053 charges that were found to be without merit still had to incur very substantial expenses in responding to those charges. And 1989 was not atypical: in 1988, the EEOC found merit in only 10,641 (15.0%) of the 70,749 charges it resolved; in 1987, in 8,114 (15.2%) of 53,482; in 1986, in 9,613 (15.2%) of 63,446; and in 1985, in 10,935 (17.2%) of 63,567. *Id.* Thus, during this five-year period, out of 317,453 charges resolved by the EEOC, 266,994 (about 85%!) were found to be without merit -- but only after the target companies had incurred substantial expenses responding to them. Indeed, the total number of charges found to have merit during this entire time frame was less than the number found to be meritless in 1989 alone!

Thus, Title VII brings with it not just an obligation not to engage in irrational discrimination -- which is in firms' economic self-interest anyhow -- but also the very substantial cost of dealing with meretricious charges of discrimination. Imposing those costs upon American firms operating overseas could have some very perverse and undesirable effects.

A. Applying Title VII overseas would encourage companies to discriminate against American citizens in their hiring.

First, since Title VII plainly does not cover aliens employed abroad, companies operating overseas would have a clear incentive to prefer aliens over American citizens in their hiring. American citizens would bring with them the potential cost of an EEOC investigation or a private lawsuit; aliens would not. And it is not

enough to say that a company could avoid such costs just by complying with the law, because as we just pointed out, 85% of the time when charges are filed with the EEOC, it determines that the company involved did comply with the law.

Nor should the potential effect of this cost differential be underestimated. Studies have found that in the United States, companies discriminate against hiring marginally qualified blacks because of the potential cost of EEOC investigations and lawsuits if they are hired and ultimately not promoted or fired. 2 *Selected Affirmative Action Topics in Employment and Business Set-Asides*, U.S. Commission on Civil Rights 115 (1985) (statement of Dr. Finis Welch).

It would certainly be anomalous if as a result of extending the reach of our nation's antidiscrimination laws, we ended up encouraging companies overseas to discriminate against Americans by not hiring them in the first place. But more importantly for present purposes, this result is an example of why it is so important to adhere to the *Benz* rule, and not to apply Title VII overseas unless and until Congress clearly says to do so.

B. Applying Title VII overseas would place American firms at a competitive disadvantage relative to foreign firms.

Furthermore, while the logic of petitioners' arguments would suggest that all foreign employers would be subject to Title VII in their dealings with American employees, even the EEOC recognizes that only some foreign employers would actually be covered. Policy Statement No. N-915.033, EEOC Compl. Man. (BNA), at 605:0055 (Sept. 2, 1988). Foreign employers not subject to Title VII would have a cost advantage over American firms overseas. Considering the broad

debate and concern over this country's competitiveness in overseas markets, it would be perfectly reasonable for Congress to conclude that the amount of employment discrimination occurring overseas does not justify placing American firms at a competitive disadvantage. Again, this illustrates the wisdom and importance of the *Benz* rule.

IV. AFFIRMING THE JUDGMENT BELOW WILL NOT PROMPT AN EXPLOSION OF DISCRIMINATION BY AMERICAN COMPANIES OPERATING OVERSEAS.

Finally, we wish to respond very briefly to the suggestion by petitioners and some of the *amici* supporting them that if this Court affirms the judgment of the court of appeals, there will be an explosion of racism, sexism, and all sorts of other loathsome conduct at American firms overseas. Petitioner Boureslan even conjures up images of sexual assaults in airplane lavatories somewhere over the Atlantic! Boureslan Brief at 9. This is just plain silly.

First, as we explained earlier, irrational discrimination imposes costs upon a firm. Therefore, there is a strong market incentive for firms to avoid such discrimination, even when not required to do so by statute. A firm that tolerated sexual assaults in lavatories over the Atlantic would find itself losing both employees -- male and female -- and customers.

Moreover, employment discrimination at American firms operating overseas has never been a major problem, except for discrimination against Jews and women in certain Moslem countries -- a type of discrimination that petitioners would allow to continue under the "bona fide occupational qualification" proviso of Title VII! EEOC Brief at 27. The first time the EEOC ever found merit to a charge of discrimination

overseas was in 1985 -- 21 years after Title VII was enacted. Considering the low level of the problem historically, there is no reason to expect an explosion of discrimination at this late date.

CONCLUSION

The judgment of the Fifth Circuit should be affirmed.

Respectfully submitted,

Daniel J. Popeo
Paul D. Kamenar
WASHINGTON LEGAL FOUNDATION
1705 N Street, N.W.
Washington, D.C. 20036
(202) 857-0240

Jeffrey I. Zuckerman
(Counsel of Record)
CURTIS, MALLET-PREVOST, COLT & MOSLE
1735 I Street, N.W.
Washington, D.C. 20006
(202) 331-9797

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Nos. 89-1838 and 89-1845

DEC 17 1990
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
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On Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF AMICUS CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF THE RESPONDENTS

ROBERT E. WILLIAMS
DOUGLAS S. MCDOWELL *
EDWARD E. POTTER, P.C.
MCGUINESS & WILLIAMS
1015 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005
(202) 789-8600

Attorneys for the Amicus Curiae, Equal Employment Advisory Council

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTEREST OF THE AMICUS CURIAE	1
ISSUE PRESENTED	3
STATEMENT OF THE CASE	3
SUMMARY OF ARGUMENT	5
ARGUMENT	9
I. TITLE VII CANNOT PROPERLY BE INTERPRETED TO COVER EMPLOYERS OF AMERICAN CITIZENS WORKING OUTSIDE THE UNITED STATES, BECAUSE THE LANGUAGE OF TITLE VII AND ITS LEGISLATIVE HISTORY EVIDENCE NO AFFIRMATIVE CONGRESSIONAL INTENT TO APPLY TITLE VII EXTRATERRITORIALLY	9
A. Employment Statutes Are Presumed To Apply Within the Boundaries of the United States Unless Congress Clearly Expresses Its Intent That Such a Statute Is To Have Extraterritorial Application	9
B. When Congress Has Intended That an Employment Statute Should Apply Outside the United States, It Has Shown That Intent Clearly and Unambiguously	12
II. EXTRATERRITORIAL APPLICATION OF TITLE VII WOULD CONFLICT WITH PROPER CONSTRUCTION OF INTERNATIONAL LAW PRINCIPLES	14
A. The Dissent and the Amici Incorrectly Rely On Restatement (Third) Section 403 Without First Having Established a Basis of Jurisdiction Under Restatement (Third) Section 402	14
B. Extraterritorial Application of Title VII Would Be Impractical and Unreasonable	18

TABLE OF CONTENTS—Continued

	Page
III. CONGRESS' FAILURE TO ESTABLISH OVERSEAS PROCEDURES FOR ENFORCEMENT, DEFERRAL OF CASES, INDIVIDUAL RELIEF AND CONFLICTS OF LAWS IS FURTHER COMPELLING EVIDENCE THAT IT DID NOT ENVISION EXTRATERRITORIAL APPLICATION OF TITLE VII	20
A. Overseas Application of Title VII's Remedial Provisions Would Impact Directly on the Nationals of the Host Country	20
B. Overseas Application of Title VII's Procedural Mechanism Would Be Impractical and Should Not Be Imposed in Other Countries Given the Lack of a Congressional Mandate To Do So	22
IV. *AMICI* NAACP, LEGAL DEFENSE FUND, *ET AL.*, MISCONSTRUE CONGRESSIONAL INTENT AND IMPROPERLY URGE THIS COURT TO MAKE FOREIGN POLICY DECISIONS CONCERNING EMPLOYMENT PRACTICES OVERSEAS	25
CONCLUSION	29

TABLE OF AUTHORITIES

Cases:	Page
Abrams v. Baylor College of Medicine, 805 F.2d 528 (5th Cir. 1986)	28
Air Line Dispatchers Ass'n v. National Mediation Board, 189 F.2d 685 (D.C. Cir. 1951), *cert. denied*, 342 U.S. 849 (1951)	10
Argentine Republic v. Amerada Hess Shipping Corp., 109 S.Ct. 683 (1989)	5, 9, 10, 11, 14, 23
Benz v. Compania Naviera Hidalgo, S.A., 353 U.S. 138 (1957)	9, 10
Bryant v. International School Servs., Inc., 502 F. Supp. 472 (D.N.J. 1980), *rev'd on other grounds*, 675 F.2d 562 (2d Cir. 1982)	14
Cleary v. United States Lines, Inc., 728 F.2d 607 (3d Cir. 1984)	3, 12, 23
Connecticut v. Teal, 457 U.S. 440 (1982)	2
EEOC Dec. No. 77-1, Empl. Prac. Dec. (CCH) ¶ 6557 (October 31, 1976)	29
EEOC Dec. No. 84-2, Empl. Prac. Dec. (CCH) ¶ 6840 (December 2, 1983)	29
Franks v. Bowman Transportation Co., 424 U.S. 747 (1976)	21
Foley Bros., Inc. v. Filardo, 336 U.S. 281 (1949)	5, 9, 10, 14, 19, 22
Hodgson v. Union de Permisionarios Circulo Rojo, 331 F. Supp. 1119 (S.D. Tex. 1971)	8
Int'l Bhd. of Teamsters v. United States, 431 U.S. 324 (1977)	2
Kern v. Dynalectron Corp., 577 F. Supp. 1196 (N.D. Tex. 1983), *aff'd*, 746 F.2d 810 (5th Cir. 1984)	28
Laker Airways v. Sabena, Belgian World Airlines, 731 F.2d 909 (D.C. Cir. 1984)	16
Love v. Pullman Co., 13 Fair Emp. Prac. Cases (BNA) 424 (D. Colo. 1976), *aff'd*, 569 F.2d 1074 (10th Cir. 1978)	14
Martin v. Wilks, 109 S.Ct. 2180 (1989)	8, 21
McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10 (1963)	9
Pfeiffer v. Wm. Wrigley Jr. Co., 755 F.2d 554 (7th Cir. 1985)	3, 12, 16, 28

TABLE OF AUTHORITIES—Continued

	Page
Ralis v. RFE/RL, Inc., 770 F.2d 1121 (D.C. Cir. 1985)	12
S.F. DeYoreo v. Bell Helicopter Textron, Inc., 785 F.2d 1282 (5th Cir. 1986)	12, 13
Steele v. Bulova Watch Co., 344 U.S. 280 (1952)	22
Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981)	2
Thomas v. Brown and Root, Inc., 745 F.2d 279 (4th Cir. 1984)	12
United States v. Davis, 767 F.2d 1025 (2d Cir. 1985)	16
United States v. Mitchell, 553 F.2d 996 (5th Cir. 1977)	9
United States v. Wright-Barker, 784 F.2d 161 (3d Cir. 1986)	16
Wards Cove Packing, Inc. v. Atonio, 109 S.Ct. 2115 (1989)	2
Watson v. Fort Worth Bank and Trust Co., 108 S.Ct. 2777 (1988)	2
Zahourek v. Arthur Young & Co., 750 F.2d 827 (10th Cir. 1985)	3, 12
Statutes:	
Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. § 621 *et seq.*	2
Section 4(f)(1), 29 U.S.C. § 623(f)(1)	8, 25
Section 4(g)(1), 29 U.S.C. § 623(g)(1)	13
Section 11(f), 29 U.S.C. § 630(f)	12
Foreign Sovereign Immunities Act, 28 U.S.C. § 1330 *et seq.*	10, 23
Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.*	2
Section 702, 42 U.S.C. § 2000e-1	6, 11
Section 706, 42 U.S.C. § 2000e-5(c)	24
Section 706, 42 U.S.C. § 2000e-5(d)	24
Section 706, 42 U.S.C. § 2000e-5(e)	24
Section 706, 42 U.S.C. § 2000e-5(f)(3)	23
Section 708, 42 U.S.C. § 2000e-7	24

TABLE OF AUTHORITIES—Continued

	Page
Section 710, 42 U.S.C. § 2000e-9	23
Section 1104, 42 U.S.C. § 2000h-4	24
14 U.S.C. § 89(a)	11
18 U.S.C. § 7	11
19 U.S.C. § 1701	11
28 U.S.C. § 1404	7, 23
Legislative History:	
S. Rep. No. 98-467, 98th Cong., 2d Sess. 2 (1984)	13
S. Res. 323, 84th Cong., 2d Sess. (1956), *quoted in* 102 Cong. Rec. 14330 (July 25, 1956)	25, 26
129 Cong. Rec. 34,499 (1983)	13
Miscellaneous:	
Country Reports on Human Rights Practices for 1989, Report by the U.S. Department of State to the House Comm. on Foreign Affairs and the Senate Comm. on Foreign Relations, 101st Cong., 2nd Sess. at 1557-60 (February, 1990)	25
Equality in Employment and Occupation, General Survey by the Committee of Experts on the Application of Conventions and Recommendations, International Labor Organization (1988)	18
EEOC Policy Statement on Remedies and Relief for Individual Victims of Discrimination, 8 Fair Emp. Prac. Man. (BNA) at 405:3001	20, 21
International Labor Convention No. 111, Concerning Discrimination in Respect of Employment and Occupation	24
Kirschner, *The Extraterritorial Application of Title VII of the Civil Rights Act*, 34 Lab. Law J. 394 (July 1983)	12
Labor and Workmen Law	19
Articles 48-50 (Employment of Foreigners)	19
Article 80 (Labor Contract)	19
Article 91 (Obligations of Employer)	19
Articles 160-62, 164-70 (Employment of Women)	19

TABLE OF AUTHORITIES—Continued

	Page
Note, *Yankees Out of North America: Foreign Employer Job Discrimination Against American Citizens*, 83 Mich. L. Rev. 237 (1984)	28
Restatement (Third) Foreign Relations Law of the United States (1987)	5, 6
Section 401	6, 16
Section 402	6, 15, 16, 17
Section 403	5, 6, 15, 16, 17

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. 89-1838

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Petitioner,

v.

ARABIAN AMERICAN OIL CO., *et al.*,
Respondents.

No. 89-1845

ALI BOURESLAN,
Petitioner,

v.

ARABIAN AMERICAN OIL CO., *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF AMICUS CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF THE RESPONDENTS

The Equal Employment Advisory Council (EEAC) respectfully submits this brief amicus curiae which supports the respondents' position and seeks the affirmance of the en banc majority opinion of the court below.

INTEREST OF THE AMICUS CURIAE

EEAC is a nationwide association of employers organized in 1976 to promote sound approaches to the elimination of employment discrimination. Its membership comprises a broad segment of the employer community

in the United States, including over 220 major corporations and several trade associations which themselves have hundreds of corporate members. Its Board of Directors is composed of experts in labor and equal employment opportunity. Their combined experience gives EEAC a unique depth of understanding of the practical, as well as legal aspects of EEO policies and requirements.

As employers, EEAC's members are subject to the provisions of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.*, and the other various federal orders and regulations pertaining to nondiscriminatory employment practices. Also, many of EEAC's members are multinational corporations with overseas facilities employing both United States citizens and nationals of other countries. As such, EEAC members have a direct interest in the issue presented for the Court's consideration in this case; that is, whether the provisions of Title VII of the Civil Rights Act of 1964 apply to American citizens working overseas for American companies. Indeed, EEAC filed briefs amicus curiae before the initial court of appeals panel and the en banc court in the instant case on the precise issue now before this Court.

As a significant part of its activities, EEAC has participated as amicus curiae in a number of cases involving the interpretation and enforcement of Title VII.[1] In addition, EEAC has filed several amicus curiae briefs in cases involving the extraterritorial application of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 *et seq.* These briefs were filed before Congress amended the ADEA in 1984 to extend its coverage ex-

[1] *E.g.*, *Wards Cove Packing, Inc.* v. *Atonio*, 109 S.Ct. 2115 (1989); *Watson v. Forth Worth Bank and Trust Co.*, 108 S.Ct. 2777 (1988); *Connecticut v. Teal*, 457 U.S. 440 (1982); *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981); *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324 (1977).

pressly to United States citizens abroad.[2] Accordingly, because of the potentially enormous impact upon the employment practices and policies of corporations who employ individuals abroad and must comply with the conflicting laws of their host countries, this brief is submitted on behalf of EEAC's nationwide constituency.

ISSUE PRESENTED

Did Congress intend in 1964 to extend the employment discrimination provisions of the Civil Rights Act of 1964 overseas to regulate the practices of U.S. employers of U.S. citizens in workplaces outside the United States?

STATEMENT OF THE CASE

The facts are fully set forth in the Respondents' brief and adopted by reference herein. The facts most pertinent to EEAC's brief are set forth below.

The plaintiff, a Moslem United States citizen, was born in Lebanon and worked for the ARAMCO Service Company (ASC) in Texas until 1980, when he requested a transfer to Saudi Arabia to work for the Arabian American Oil Company (ARAMCO). The plaintiff subsequently instituted this action alleging that his British supervisor in Saudi Arabia began harassing him about his national origin, race and religion in September 1982. He subsequently was laid off in June 1984, and initiated these proceedings.

The district court granted ARAMCO's motion to dismiss for lack of subject matter jurisdiction, and held that Title VII could not be applied extraterritorially. *Boureslan v. ARAMCO*, Pet. App. 77a-82a.[3] Specifically, the

[2] *See Pfeiffer v. Wm. Wrigley Jr. Co.*, 755 F.2d 554 (7th Cir. 1985); *Zahourek v. Arthur Young & Co.*, 750 F.2d 827 (10th Cir. 1985); and *Cleary v. United States Lines, Inc.*, 728 F.2d 507 (3d Cir. 1984).

[3] Pet. App. references are to the appendix to the United States' petition for a writ of certiorari.

court found that "Congress enacted Title VII to remedy domestic discrimination" and "[t]here is no indication that Congress was concerned about discrimination abroad." *Id.* at 79a. The court concluded that the imposition of Title VII abroad would invade the sovereignty of other nations, noting in this case that Saudi Arabian employment law conflicted with Title VII.

A Fifth Circuit panel affirmed the district court's decision by a 2-1 vote, and the full court later reaffirmed that decision. The court noted in its en banc decision that it could find no indication in the law or in Title VII's legislative history that Congress intended to extend civil rights protection to American citizens employed abroad. The court rejected Boureslan's and the Equal Employment Opportunity Commission's (EEOC) arguments that Title VII's protections should be extended to Americans working abroad. Instead, the Fifth Circuit found strong countervailing policy arguments against the extraterritorial application of Title VII. The court below further noted that religious and social customs practiced in many countries are at odds with those of this country. Yet Title VII says nothing about potential conflicts with foreign discrimination laws. Indeed, the panel majority noted that "[r]equiring American employers to comply with Title VII in such a country could well leave American corporations the difficult choice of either refusing to employ United States citizens in the country or discontinuing business." Pet. App. at 41a.

The en banc decision further pointed out that Title VII is silent in a number of areas where Congress ordinarily provides guidance if it wishes to apply a statute extraterritorially. For example, the Act has no provisions for venue problems that arise with foreign violations. Also, the statute seems to limit EEOC's investigatory powers to the United States and its territories. Pet. App. at 5a.

In lengthy dissents, Judge King argued that Congress intended that Title VII apply to the overseas operations of American corporations. The dissent reasoned that the Act's exemption for aliens employed outside the United States implies that United States citizens working outside the United States are covered by Title VII. In addition, Judge King argued that Title VII could be enforced with existing venue, investigatory and other provisions.

Judge King's panel dissent, which was adopted in the en banc dissent (Pet. App. at 8a n. 1), set forth additional reasons for applying Title VII overseas. This analysis rested in large part upon Section 403, Restatement (Third) of the Foreign Relations Law of the United States, which Judge King interpreted to mean that "a statute will not be applied extraterritorially where it would be unreasonable to do so, unless Congress has affirmatively required that it be so applied." Pet. App. at 51a. In Judge King's view, extraterritorial application of Title VII would not be unreasonable, and therefore the statute should be applied abroad without any "affirmative" statement of congressional intent. Pet. App. at 74a.

SUMMARY OF ARGUMENT

When Congress enacts an employment statute, the courts presume that Congress is concerned with domestic employment conditions and not those outside the United States. *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 285 (1949). Accordingly, the courts have adopted a canon of construction that a statute enacted by Congress is *presumed* to apply within the territorial United States. *Id.; Argentine Republic v. Amerada Hess Shipping Corp.*, 109 S.Ct. 683 (1989). This presumption can be overcome only by a clear expression by Congress that it intends that the statute be applied extraterritorially. *Foley Bros.*, 336 U.S. at 286.

Neither the Supreme Court nor any federal appeals court has ever applied an employment statute extraterri-

torially unless Congress has affirmatively expressed its intent by statutory language stating that the statute is applicable "outside the continental United States," "in a foreign country" or by equivalent language. Here, there is no direct statutory language or legislative history clearly expressing that Title VII applies overseas.

The presumption against extraterritoriality cannot be overcome by reliance upon Section 403 of Restatement (Third), Foreign Relations Law of the United States ("Restatement"). Indeed, the Restatement reinforces, rather than rebuts, the presumption. Section 401 establishes the principle that a state has a legitimate right to exercise its jurisdiction in certain ways, but may not regulate individuals or conduct overseas without limitation. Section 402, in turn, provides the foundation for an affirmative exercise of such jurisdiction by the state, and provides in pertinent part that: "[s]ubject to § 403, a state has jurisdiction to prescribe with respect to . . . (2) the activities, interests, status, or relations of its nationals outside as well as within its territory . . . ." Section 403 then follows and provides the limitations on states' jurisdiction to prescribe laws and sets forth the "reasonableness" limitation of international law when a state affirmatively attempts to apply a domestic law outside its own territory.

To the extent the dissent's and the EEOC's analyses focus on the principles set forth in Section 403(1), they bypass the initial inquiry set forth in Section 402—that is, whether Congress did, in fact, prescribe in Title VII to regulate the activities or conduct of individuals outside of its territory. For if there is no such law, logically, there can be no such determination of its reasonableness. In this case, Congress has never indicated that Title VII would apply to United States citizens working abroad. Moreover, Section 702 of Title VII cannot be used to draw the negative inference that Title VII must cover United States citizens extraterritorially because it exempts only "aliens outside any state."

Amici NAACP, Legal Defense and Educational Fund, Inc., *et al.* offer policy arguments based on an unsupported assumption that American employers affirmatively will engage in discrimination abroad. From a practical standpoint, however, employers often must specially train workers for overseas assignments and provide them with special compensation, terms and other conditions of employment. The costs of such efforts are higher than those associated with domestic employment. Thus, the economic costs of discrimination abroad are prohibitive, and serve as effective deterrents to discourage rather than encourage employers to engage in such practices. Nor is extraterritorial application of Title VII necessary to prevent domestic corporations from making decisions to exclude minorities, women and other protected individuals from overseas assignments. In such cases, there generally will be sufficient nexus to the United States to allow the assertion of Title VII jurisdiction, thus allowing an examination of whether the practice violates the Title VII rights of U.S. citizens.

Other arguments of the petitioners and their supporting *amici* are fraught with pitfalls. As a practical matter, a comprehensive employment discrimination law such as Title VII cannot be applied overseas without any appropriate procedural mechanisms. Yet, when Congress enacted Title VII in 1964, it limited venue and the EEOC's investigatory powers to testimony or evidence obtained within the states of the United States. When it amended the law in 1972, it failed to broaden these powers to matters overseas. And although venue might be possible where a corporation has its U.S. headquarters, documents and witnesses may be thousands of miles away with no possibility of a change of venue for the convenience of the parties or in the interests of justice. 28 U.S.C. § 1404. In addition, Title VII makes no provision for exempting coverage where it would conflict with the laws of another sovereign power.

In addition, when an American employer's overseas work force has citizens of various countries, application of standard Title VII remedies could directly harm non-Americans. For example, the EEOC's remedial guidelines call for reinstatement, "bumping" of incumbents, discipline or discharge of offending supervisors, and preferential treatment remedies for identified victims of discrimination. Employers could protect against attacks upon case settlements by joining non-U.S. citizens to a suit in federal court in order to protect their interests. See *Martin v. Wilks*, 109 S.Ct. 2180 (1989). But this not only would draw noncitizens directly into the American legal system; it would require them to travel to the United States in order to protect their job status. If Congress intended such a result, it hardly comes clear from a reading of Title VII.

In contrast to Title VII's silence, when Congress amended the ADEA in 1984 to extend jurisdiction of its provisions extraterritorially, it expressly exempted employer practices involving U.S. citizens that would cause the company to violate the laws of the host country. 29 U.S.C. § 623 (f)(1). Thus, when Congress has intended that a United States employment statute be applied to American companies overseas, it has exercised great care to ensure that such application will not conflict with foreign statutes.

Were this Court to accept the economic and international policy arguments set forth by the petitioners and their amici, it effectively would be making foreign policy and legislative decisions in a matter where Congress has chosen not to act. "It is [outside] the province of this Court to delve into matters international on such a tenuous basis." *Hodgson v. Union de Permisionarios Circulo Rojo*, 331 F. Supp. 1119, 1122 (S.D. Tex. 1971).

ARGUMENT

I. TITLE VII CANNOT PROPERLY BE INTERPRETED TO COVER EMPLOYERS OF AMERICAN CITIZENS WORKING OUTSIDE THE UNITED STATES, BECAUSE THE LANGUAGE OF TITLE VII AND ITS LEGISLATIVE HISTORY EVIDENCE NO AFFIRMATIVE CONGRESSIONAL INTENT TO APPLY TITLE VII EXTRATERRITORIALLY.

A. Employment Statutes Are Presumed To Apply Within the Boundaries of the United States Unless Congress Clearly Expresses Its Intent That Such a Statute Is To Have Extraterritorial Application.

The question before the Court is whether Title VII of the Civil Rights Act of 1964, which generally prohibits employment discrimination on the basis of race, color, religion, sex or national origin, covers United States citizens employed by U.S. companies in foreign countries. It is a well-established canon of construction that a statute enacted by Congress is presumed to apply only within the territorial jurisdiction of the United States *unless a contrary intent is expressed. Argentine Republic v. Amerada Hess Shipping Corp.*, 109 S.Ct. 683 (1989); *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 285 (1949); *United States v. Mitchell*, 553 F.2d 996, 1002 (5th Cir. 1977). In the "delicate field of international relations *there must be present the affirmative intention of the Congress clearly expressed.* It alone has the facilities necessary to make fairly such an important policy decision. . . ." *Benz v. Compania Naviera Hidalgo, S.A.*, 353 U.S. 138, 147 (1957) (emphasis added).

The courts, including the appellate and district courts below, have uniformly construed United States employment laws as being limited to the territorial boundaries of the United States absent an affirmative expression of congressional intent that the statute have an extraterritorial effect. *See, e.g., McCulloch v. Sociedad Nacional de*

Marineros de Honduras, 372 U.S. 10, 19 (1963) (National Labor Relations Act held not to apply to maritime operations of foreign flagships absent "specific language in the act itself or in its extensive legislative history that reflects such a congressional intent").[4] In sum, absent a clear expression of congressional intent to apply an employment statute outside the United States, the courts assume "that Congress is primarily concerned with domestic conditions." *Foley*, 336 U.S. at 285.

This Court in *Argentine Republic v. Amerada Hess Shipping Corp.*, 109 S.Ct. 683 (1989), recently applied these principles and restated the necessity of affirmative congressional intent to extend a statute extraterritorially. *Argentine Republic* involved the issue of whether the federal courts have jurisdiction over noncommercial tort claims against a foreign country under the Foreign Sovereign Immunities Act (FSIA) 28 U.S.C. § 1330 *et seq.* Specifically, the Court focused on whether the FSIA conferred jurisdiction over tortious acts committed on the high seas outside of United States territorial waters.[5] The Court observed that "when it desires to do

[4] *See also, Benz*, 353 U.S. at 142 (Labor Management Relations Act of 1947 held not to extend to disputes resulting from picketing of foreign ships in United States ports because parties could "point to nothing in the Act itself or its legislative history" indicating congressional intent to cover such disputes, as "there must be present the affirmative intention of Congress clearly expressed." *Id.* at 147); *Foley Bros.*, 336 U.S. at 286 (Eight Hour Law held not to apply to contracts between the United States and private contractors for construction work in a foreign country "in the absence of a clearly expressed purpose" by Congress); *Air Line Dispatchers Ass'n. v. National Mediation Board*, 189 F.2d 685 (D.C. Cir. 1951), *cert. denied*, 342 U.S. 849 (1951) (amendment to Railway Labor Act which extended coverage to air carriers "engaged in interstate or foreign commerce" held not to apply outside the United States in the absence of explicitly congressional intent).

[5] Respondents brought these claims against the Argentine government for damages its ship sustained when it was attacked in international waters by Argentine military aircraft during the Falkland Islands war. 109 S.Ct. at 686-87.

so, Congress knows how to place the high seas within the jurisdictional reach of a statute." 109 S.Ct. 691.[6] Since Congress made no affirmative statements to apply the FSIA extraterritorially, the Court applied *Foley* and held that the FSIA does not extend to tortious conduct outside the United States territorial waters. *Id.*

The *Argentine Republic* principles are no less applicable in this case. In enacting Title VII, Congress was concerned solely with the domestic aspects of employment discrimination. Indeed, after examining the statutory language and legislative history of Title VII, the court below correctly concluded that, "[the] references to Title VII's legislative history fall far short of the clear expression of congressional intent required to overcome the presumption against extraterritorial application." (Pet. App. at 38a); and *see* (Pet. App. at 81a) ("[i]t is much more likely that Congress never considered the issue."). And as the majority below observed:

> The statements, carefully taken from a voluminous legislative history, are no more specific than the statutory language itself. To rely on such general policy statements would effectively adopt a presumption in favor of extraterritorial application. This is particularly true when the legislative history contains numerous statements that arguably favor geographic limits for Title VII.

Pet. App. at 38a. And *see* Pet. App. at 81a. ("It is doubtful that Congress reserved the question of Title VII's application for the courts to decide.").[7]

[6] The Court cited three statutes as examples where Congress specifically referred to the high seas in order to extend extraterritorial jurisdiction. *See, e.g.*, 14 U.S.C. § 89(a) (Coast Guard searches and seizures upon the high seas); 18 U.S.C. § 7 (Criminal code extends to high seas); 19 U.S.C. § 1701 (Customs enforcement on the high seas). 109 S.Ct. at 691 n.7.

[7] *Amicus* EEAC further urges the Court to adopt the panel holding that the alien exemption found in Section 702 of Title VII does not imply that U.S. citizens working overseas are covered by Title VII. This issue has been fully briefed in the respondents' briefs to

B. When Congress Has Intended That an Employment Statute Should Apply Outside the United States, It Has Shown That Intent Clearly and Unambiguously.

Congress has demonstrated on many occasions that it is well aware that it must specifically and directly provide for the extraterritorial application of an employment statute when it intends the statute have such effect. For example, several courts had ruled that the Age Discrimination in Employment Act (ADEA) did not apply extraterritorially.[8] In response, Congress in 1984 amended Section 11(f) of the ADEA by adding a new sentence to the definition of "employee" to provide that: "The term 'employee' includes any individual who is a citizen of the United States employed by an employer in a workplace *in a foreign country*." 29 U.S.C. § 630(f) (emphasis

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this Court. EEAC agrees with those arguments. As further briefing would be repetitious, we adopt those arguments by reference.

We point out, however, that one commentator on the exemption provision, noting the absence of legislative history regarding its purpose, has stated that "the exemption language . . . was simply adopted from early civil rights legislation that was introduced at a time [1949] when aliens were excluded from certain domestic protective labor legislation and restricted in their employment opportunities within the United States. . . . [A]t the time, the original drafters did not want to call attention to the fact that such legislation would apply to citizens as well as aliens in the United States." Kirschner, 34 Lab. Law J. at 399-400 (July 1983) (footnote omitted). Under these circumstances, the alien exemption provision alone, which does not directly address the application of Title VII to U.S. citizens, can hardly be said to be a clear expression of congressional intent to apply Title VII to U.S. citizens extraterritorially.

[8] Six circuits held that the ADEA prior to 1984 did not cover American citizens employed in foreign countries. *E.g., S.F. DeYoreo v. Bell Helicopter Textron, Inc.*, 785 F.2d 1282 (5th Cir. 1986); *Ralis v. RFE/RL, Inc.*, 770 F.2d 1121 (D.C. Cir. 1985); *Pfeiffer v. Wm. Wrigley, Jr. Co.*, 755 F.2d 554 (7th Cir. 1985); *Zahourek v. Arthur Young and Co.*, 750 F.2d 827 (10th Cir. 1984); *Thomas v. Brown and Root, Inc.*, 745 F.2d 279 (4th Cir. 1984); and *Cleary v. United States Lines, Inc.*, 728 F.2d 607 (3d Cir. 1984).

added). Furthermore, it added a new Section 4(g)(1) that states: "If an employer controls a corporation whose place of incorporation is *in a foreign country*, any practice by such corporation prohibited under this section shall be presumed to be such practice by such employer." 29 U.S.C. § 623(g)(1) (1984) (emphasis added). These statutory provisions are also supported by unequivocal legislative history that these amendments "make[] provisions of the Act apply to citizens of the United States employed in foreign countries by United States corporations or their subsidiaries." S. Rep. No. 98-467, 98th Cong., 2d Sess. 2 (1984). In contrast, neither Title VII nor its legislative history contains any such direct expression that it applies extraterritorially.

Congress obviously considered the 1984 amendment to the ADEA necessary to provide an affirmative expression of its intent. In *S.F. DeYoreco v. Bell Helicopter Textron, Inc.*, 785 F.2d 1282 (5th Cir. 1986), the Court concluded that the amendment must have added something that was not already there. "If Congress found it necessary to extend the coverage of the ADEA to foreign-employed United States citizens, the statute's reach must not originally have gone that far." *Id.* at 1283. Thus, the 1984 amendment effectively changed the law rather than just clarified it.[9]

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[9] Senator Grassley's statement when introducing the ADEA amendment in 1983 does not establish that Congress intended to make Title VII applicable overseas. See 129 Cong. Rec. 34,499 (1983). The Senator stated that the substantive provisions of the ADEA and Title VII are "worded nearly exactly" the same and that "at least two district courts have held [that Title VII] does apply abroad. Thus, the legislation I am introducing today clears up an anomaly I believe Congress never intended." *Id.*

The real anomaly, however, is that, having made this statement, Senator Grassley proceeded to not use Title VII's language on employee coverage to amend the ADEA. Instead, he used more specific language to make sure that the ADEA would apply outside the United States. Indeed, since he felt Title VII and the ADEA's substantive language were nearly identical, the fact that he used

Accordingly, when Title VII is compared with employment and other statutes in which Congress has directly and unambiguously made clear its intention that the statute have extraterritorial effect, it is evident that in enacting Title VII, Congress manifested no such intent.

II. EXTRATERRITORIAL APPLICATION OF TITLE VII WOULD CONFLICT WITH PROPER CONSTRUCTION OF INTERNATIONAL LAW PRINCIPLES.

A. The Dissent and the Amici Incorrectly Rely On Restatement (Third) Section 403 Without First Having Established a Basis of Jurisdiction Under Restatement (Third) Section 402.

As shown, the well-established principles found in *Foley*, *Argentine Republic* and other decisions create the presumption against extraterritorial application of a federal statute. Indeed, as Judge King's initial dissent in this case recognized, ordinarily there is "a presumption that Congress intends legislation to apply only within the territorial jurisdiction of the United States, unless a contrary intent appears." Pet. App. 43a-44a.

The dissent (Pet. App. 50a-60a), and amici curiae Lawyers' Committee for Civil Rights Under Law and International Human Rights Law Group argue, however, that because, in their view, it would be "reasonable" under principles of international law to apply Title VII outside

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different jurisdictional language would indicate he felt he had to go beyond Title VII to assure overseas coverage of the ADEA. Moreover, the two district court cases hardly are persuasive as to Title VII's coverage. One merely addresses the issue in dicta (*Love v. Pullman Co.*, 13 Fair Empl. Prac. Cases (BNA) 423 (D. Colo. 1876), *aff'd*, 569 F.2d 1074 (10th Cir. 1978)), and the other was reversed on appeal. See *Bryant v. International Schools Servs., Inc.*, 502 F. Supp. 472 (D.N.J. 1980), *rev'd on other grounds*, 675 F.2d 562 (3d Cir. 1984). Thus, the meager legal weight of these authorities is hardly sufficient to overcome the presumption against statutory extraterritory.

the United States, the presumption is thereby overcome. Their primary authority is Section 403 of Restatement (Third), Foreign Relations Law of the United States ("Restatement"). As discussed below, however, the Restatement reinforces, rather than rebuts, the presumption against extraterritoriality.

Under international law, a state may not regulate individuals or conduct overseas without limitation. Section 401 of the Restatement provides in part:

> Under international law, a state is subject to limitations on[:]
>
> (a) jurisdiction to prescribe, *i.e.*, to make its law applicable to the activities, relations, or status of persons, or the interests of person in things, whether by legislation, by executive act or order, by administrative rule or regulation, or by determination of a court; . . . .

Section 402, in turn, provides the foundation for an affirmative exercise of such jurisdiction by the state. It is clear from the Introductory Note to Section 402, however, that the jurisdictional chapter of the Restatement was intended to provide limitations on the overseas exercise of the state's authority. Thus:

> Attempts by some states—notably the United States—to apply their law on the basis of very broad conceptions of territoriality or nationality bred resentment and brought forth conflicting assertions of the rules of international law.

Restatement at 236. When the United States attempted to exercise its authority overseas in a whole range of areas (e.g., economic sanctions, maritime, aeronautics, antitrust, securities), it generated resentment, blocking legislation, and conflicting assertions of jurisdiction. *Id.* at 236.

Accordingly, the United States courts, and courts in other countries, have interpreted the "known or presumed

intent of Congress, in light of changing understandings." *Id.* at 236-37. Because of these concerns about overly aggressive application of United States laws in foreign lands, the Restatement indeed may erect a stronger presumption against extraterritoriality than the presumption made by our federal courts. In no way can the Restatement be interpreted to provide affirmative support for application of Title VII overseas even without an "*affirmative* statement of congressional intent," as argued in Judge King's dissent (Pet. App. at 75a, emphasis in the original).

Furthermore, while Section 401 of the Restatement establishes the principle that a state has a legitimate right to exercise its jurisdiction in certain ways, Section 402 provides that the requisite foundation for the exercise of such authority must be found. Section 402 states in pertinent part, "[s]ubject to § 403, a state has jurisdiction to prescribe with respect to . . . (2) the activities, interests, status, or relations of its nationals outside as well as within its territory. . . ." Section 403 then follows and provides the limitations on a state's jurisdiction to prescribe laws. Specifically, Section 403(1) sets forth the "reasonableness" limitation of international law: [10]

> *Even when one of the bases for jurisdiction under § 402 is present*, a state may *not* exercise jurisdiction to prescribe law with respect to a person or activity having connections with another state when

[10] Many courts have applied and interpreted the "reasonableness" test. *See, e.g., Laker Airways v. Sabena, Belgian World Airlines*, 731 F.2d 909, 923 (D.C. Cir. 1984) (Relying on Section 403(1), the court concluded that jurisdiction may not "exceed the bounds of reasonableness imposed by international law."); *United States v. Wright-Barker*, 784 F.2d 161, 168 (3d Cir. 1986); *United States v. Davis*, 767 F.2d 1025 (2d Cir. 1985). Indeed, the 1987-88 pocket part to the Restatement at 157 cites *Pfeiffer v. Wm. Wrigley, Jr. Co.*, 755 F.2d 554 (7th Cir. 1985) (ADEA does not apply overseas), as a case where assertion of jurisdiction apparently would not be reasonable under Section 403.

> the exercise of such jurisdiction is unreasonable. (Emphasis added).

The accompanying comment states that:

> The principle that an exercise of jurisdiction on one of the bases indicated in § 402 is nonetheless unlawful if it is unreasonable is established in United States law, and has emerged as a principle of international law as well. There is wide international consensus that the links of territoriality or nationality, § 402, while generally necessary, are not in all instances sufficient conditions for the exercise of such jurisdiction.

To the extent various briefs focus on the principles set forth in Section 403(1), they fail to address the initial issue posed in Section 402: whether Congress has in fact prescribed a law to regulate the activities or conduct of individuals outside of its territory under Title VII. For if there is no such law and Congress did not apply a law outside the United States, then Section 403 would not come into play, regardless of whether overseas application of the law would be reasonable.

Thus, the requirement of "reasonableness" in Restatement Section 403(1) is an additional limitation a statute must overcome in order to have extraterritorial effect, but only where Congress clearly intended that the law have such an effect. Section 403 is not an independent test for determining whether Congress, in fact, had such intent.

In the instant case, Congress has not seen fit to extend its jurisdiction to "prescribe law with respect to . . . [employment discrimination] . . . the activities, interests, status, or relations of its nationals outside as well as within its territory . . . ." Restatement Section 402. Because Congress has never expressed intent to do so, this Court is without authority to construct such intent judicially in order to satisfy policy considerations.

B. Extraterritorial Application of Title VII Would Be Impractical and Unreasonable.

The unreasonableness of applying Title VII overseas provides an additional reason why the courts should refrain from doing so absent a clearer expression of Congressional intent than presently can be found in Title VII. Thus, even if arguendo, the requisite expression of clear congressional intent to apply Title VII extraterritorially could be claimed to have been made in this case, so as to make the "reasonableness" of such jurisdiction a relevant inquiry, this factor ultimately would not avail the appellants and their *amici*, because the extraterritorial application of Title VII would be unreasonable from a practical standpoint.

Congress and the courts have been justifiably reluctant to extend the scope of employment statutes involving the personnel policies and practices of multinational companies outside the United States for two primary reasons. First, extraterritorial application of United States employment laws would invade the sovereignty of the host country to establish employment standards for workers within its territories and its own citizens. Second, it would subject companies attempting to comply with United States laws to potentially conflicting standards. These policy considerations further support the conclusion that Title VII should not be applied outside the territorial boundaries of the United States.

According to the International Labor Organization, a specialized agency of the United Nations, nearly 140 countries have enacted some form of employment discrimination statute covering both citizens and aliens.[11] These laws are not uniform and provide a wide variety

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[11] International Labor Organization, *Equality in Employment and Occupation*, General Survey by the Committee of Experts on the Application of Conventions and Recommendations (1988).

of legal requirements.[12] In the instant case, Saudi Arabian law applies to religious preferences, favoritism towards nationals and protection of women, and its substantive and procedural provisions differ from those of Title VII.[13]

Enforcement of Title VII in Saudi Arabia based on the appellant's allegations of racial, national origin and religious discrimination would clearly invade the sovereignty of Saudi Arabia, whose own discrimination statute applies to employees of foreign corporations operating within its borders. *Id.* This conflict is particularly significant here because, although ARAMCO is incorporated in the United States, its assets are owned by the Kingdom of Saudi Arabia and are almost totally located there, the great majority of its employees are nationals of Saudi Arabia or other non-United States countries, and its products are almost exclusively sold only in Saudi Arabia. The employment conditions sought to be regulated by Title VII, therefore, are the "primary concern of a foreign country." *Foley*, 336 U.S. at 286.[14]

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[12] *Id.*

[13] *See, e.g.*, Labor and Workmen Law, Articles 48-50 (Employment of Foreigners), Article 80 (Labor Contract), Article 91 (Obligations of Employer), Articles 160-62, 164-70 (Employment of Women).

[14] The dissent below inadvertently provides an additional argument against applying Title VII overseas. The dissent argues that "[w]e do not know, for example, to what extent a foreign state would enforce its own laws to regulate the employment relationship between a U.S. corporation and employees who are U.S. citizens, or whether it would make its administrative and judicial procedures available to a United States employee seeking to bring a grievance against a U.S. employer." Pet. App. at 61a. See also the amicus brief of the International Human Rights Law Group at 56. Thus, clearly, the dissent would apply Title VII in foreign nations when it had no idea of the potential conflict it would create between Title VII and the law of other host countries.

III. CONGRESS' FAILURE TO ESTABLISH OVERSEAS PROCEDURES FOR ENFORCEMENT, DEFERRAL OF CASES, INDIVIDUAL RELIEF AND CONFLICTS OF LAWS IS FURTHER COMPELLING EVIDENCE THAT IT DID NOT ENVISION EXTRATERRITORIAL APPLICATION OF TITLE VII.

The arguments that Title VII should be applied overseas are being made in a legal vacuum, for they appear to contemplate situations where a federal law may be applied without any appropriate procedural or remedial mechanisms. Realistically, it is difficult to conclude that Congress intended that a federal law have extraterritorial application when it did not concurrently provide any appropriate substantive and procedural mechanisms for such unique applications. Yet in enacting Title VII, Congress failed to provide any mechanisms for overseas enforcement. The legislature's failure to make any provision dealing with the practical consequences of extending Title VII overseas is a further compelling reason the Courts should refrain from applying Title VII overseas without a clearer mandate from Congress.

A. Overseas Application of Title VII's Remedial Provisions Would Impact Directly on the Nationals of the Host Country.

Neither the EEOC nor any of its supporting amici recognize the impact that overseas enforcement of Title VII would have on the non-U.S. citizens working side-by-side with American citizens, as occurs to a large degree in Aramco's workforce. For example, in 1985, EEOC adopted a policy that "full relief" should be sought in each case that the EEOC's District Director concludes has merit. *See* EEOC Policy Statement on Remedies and Relief for Individual Victims of Discrimination, 8 Fair Empl. Prac. Man. (BNA) at 405:3001.

Such relief could include immediate and unconditional reinstatement to the position the individual would have occupied absent discrimination. The discriminatee must be offered some job in the employer's operation for which he or she is qualified. Non-U.S. citizens could lose jobs as a result.

The EEOC's policy also states that "[i]n certain circumstances, the Nondiscriminatory Placement of a victim of discrimination may require the job displacement of another of the respondent's employees"—a potentially direct impact on individuals who are not U.S. citizens. *Id.* at 405:3003. The individual discriminatee also may be given retroactive seniority, thus affecting the relative seniority rights of non-American employees. See *Franks v. Bowman Transportation Co.*, 424 U.S. 747 (1976).

Further, should an employer wish to settle a Title VII case and protect a settlement or consent decree from later collateral attack by non-Americans, it would have to join those non-Americans as parties to the lawsuit so that the non-Americans could protect their individual rights from encroachment by a Title VII remedy benefitting others. See, *Martin v. Wilks*, 109 S.Ct. 2180 (1989). This procedure would be incredibly clumsy, particularly in light of the government's argument that these cases should be tried in the United States in jurisdictions where employers have their principal places of business.

The employer also may be required to educate a non-U.S. citizen supervisor in how to comply with Title VII. The employer also may be required by the EEOC "to discipline or remove the offending individual from personnel authority." To afford U.S. citizens greater protections than other employees could have a serious adverse effect on the morale of foreign nationals in the plant workforce. Thus, as a practical matter, extraterritorial application of Title VII would put U.S. companies under strong pressure to treat all employees as though they were covered by Title VII, even if, as in the case of Saudi Arabia, that might mean violating the laws or religious practices of the host country.

Thus, like the Court's refusal to apply the U.S. Eight Hour Law to Iran and Iraq in *Foley Bros. v. Filardo*, "it would be anomalous . . . for an act of Congress to regulate" the relative work status of both U.S. and non-U.S. citizens working for a U.S. employer overseas. 336 U.S. at 289.[15] As in *Foley*, the federal statute in question here should not be applied outside U.S. territory.

B. Overseas Application of Title VII's Procedural Mechanism Would Be Impractical and Should Not Be Imposed in Other Countries Given the Lack of a Congressional Mandate To Do So.

The overseas application of Title VII procedural mechanisms would cause severe practical problems. Without a clearer indication that Congress intended that these problems be tolerated, Title VII should be applied only in the territory of the United States. Several examples are illustrative. For one, Title VII's provisions relating to the EEOC's investigatory powers and venue demonstrate that Congress never intended Title VII to apply overseas.

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[15] The petitioners and their various supporting amici make too much of the extraterritorial application of the Lanham Act permitted by *Steele v. Bulova Watch Co.*, 344 U.S. 280 (1952). There, a U.S. citizen committed a trademark infringement in violation of federal law. Bulova Watch Company, the offended company, was a U.S. citizen, and there was no concern expressed in that case that application of the Lanham Act would improperly infringe on any foreign laws that dealt with trademark infringements. Neither were the legitimate rights of non-U.S. citizens affected by application of U.S. law overseas.

Instead, the Court stressed the nexus between the foreign acts and the U.S. market for Bulova's watches and concluded that:

> [Steele's] operations and their effects were not confined within the territorial limits of a foreign nation. He brought component parts of his wares in the United States, and spurious "Bulovas" filtered through the Mexican border into this country; his competing goods could well reflect adversely on Bulova Watch Company's trade reputation in markets cultivated by advertising here as well as abroad.

344 U.S. at 286.

As enacted in 1964, the EEOC's investigatory powers were limited to testimony or evidence obtained within the states of the United States. 42 U.S.C. § 2000e-9. The amendment of this investigatory authority in 1972 did not broaden these powers to matters overseas. Thus, "[i]f plaintiff were correct in arguing that [the statute] applies extraterritorially, it would be anomalous for Congress not to have authorized power of investigation that were co-extensive with the reach of the Act." *Cleary v. United States Lines, Inc.*, 555 F. Supp. 1251, 1260 (D.N.J. 1983), *aff'd*, 728 F.2d 607 (2d Cir. 1984).[16]

Again, when Congress intends a statute to have effect overseas, it knows how to provide appropriate enforcement mechanisms. For example, in *Argentine Republic v. Amerada Hess Shipping Corp.*, 109 S.Ct. 683 (1989), the Supreme Court analyzed the legislative history of the Foreign Sovereign Immunities Act (FSIA), and concluded that "Congress' intention to enact a comprehensive statutory scheme is also supported by the inclusion in the FSIA of provisions for venue . . . removal . . . and attachment and execution. . . ." *Id.* at 688 n.3.

In contrast, in enacting Title VII, Congress was greatly concerned that it not unduly interfere with the sovereignty or override the laws of even the various *states* of the United States. Sections 708 and 1104, 42 U.S.C.

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[16] Had Congress intended that Title VII was to have an extraterritorial reach, it would have provided for venue over the operations of American companies employing United States citizens overseas, instead of limiting venue to the employment decisions of companies within the United States. 42 U.S.C. § 2000e-5(f)(3). Further, even if "principal office" venue might be a technical possibility, there would be no chance for the parties to move for a change of venue "[f]or the convenience of the parties and witnesses, [or] in the interest of justice." 28 U.S.C. § 1404. Thus, Title VII cases would have to be tried in courts which, if a more favorable U.S. forum were available, would not hear such cases in most instances because the documents, witnesses and place of violation were thousands of miles away.

§§ 2000e-7, 2000h-4. Accordingly, Congress made specific provision in Section 706 of Title VII for deferral to state employment discrimination proceedings. 42 U.S.C. § 2000d-5(c), (d), and (e). Invasion of another *country's* sovereignty with respect to that nation's own discrimination laws would clearly be a matter of great international significance. Yet Title VII does not contain any similar provisions for deferral to the laws of another country. It would be wholly anomalous to conclude that Title VII recognizes and respects the laws of the various American states, but ignores and overrides the laws of foreign nations.

The amicus International Human Rights Law Group argues that the likelihood of conflict with Saudi Arabian policies would be minimal because Saudi Arabia has ratified International Labor Organization Convention (No. 111) Concerning Discrimination in Respect of Employment and Occupation. (Br. 57-60) This argument ignores the fact that the United States Senate has not ratified this convention, thus making implausible the conclusion that there is no potential for conflict. Further, Convention 111 is not self-enforcing. Article 2 of the Convention allows each individual ratifying country to "undertake to declare and pursue a national policy designed to promote *by methods appropriate to national conditions and practice*," the elimination of discrimination. (Emphasis added).

Even in the United States, the EEOC will not defer a charge to a state or locality unless EEOC determines that the other agency has a nondiscrimination law comparable to Title VII. See Section 706(c) of Title VII (42 U.S.C. Sec. 2000e-5(c)). EEOC does not suggest to this Court any method by which EEOC or the courts could determine whether any particular application of Title VII would conflict with the law of another country. It is ludicrous, however, to suggest that application of Title VII in Saudi Arabia would not conflict with Saudi Arabian practices.

See *Country Reports on Human Rights Practices for 1989*, Report by the U.S. Department of State to the Committee on Foreign Affairs, House of Representatives, and the Committee on Foreign Relations, U.S. Senate, February 1990, at 1557-60.

Further, the ADEA again provides another contrast with Title VII. For, unlike the ADEA, which was specifically expressed to apply abroad, Title VII makes no provision for exempting coverage where it would conflict with the laws of another sovereign power. In the amendment to the ADEA, Congress was particularly concerned that the overseas application of that employment law not conflict with the existing laws of other countries. Thus, unlike Title VII, when Congress clearly extended jurisdiction of the ADEA's provisions extraterritorially, it expressly provided in Section 4(f)(1), 29 U.S.C. § 623(f)(1), that it is not unlawful for an employer to take any action prohibited by the ADEA "where such practices involve [a United States citizen] in a foreign country, and compliance . . . would cause such employer . . . to violate the laws of the country in which such workplace is located." Thus, when Congress has intended that a United States employment statute should be applied to American companies and citizens overseas, it has exercised great care to ensure that such application would not conflict with foreign statutes.

IV. *AMICI* NAACP, LEGAL DEFENSE FUND, *ET AL.*, MISCONSTRUE CONGRESSIONAL INTENT AND IMPROPERLY URGE THIS COURT TO MAKE FOREIGN POLICY DECISIONS CONCERNING EMPLOYMENT PRACTICES OVERSEAS.

The arguments made by *amici* NAACP Legal Defense and Education Fund, *et al.*, offer no further support for the petitioners. Indeed, those arguments highlight the weakness of Petitioner's reliance on Title VII's own history. The Amici are forced to juxtapose the adoption of Senate Resolution 323, 84th Cong., 2d Sess. in 1956, with

the enactment of Title VII in 1964.[17] *Amici* NAACP Legal Defense Fund *et al.*, draw the inference that since Congress adopted the resolution in 1956, it also intended in 1964 to extend Title VII's coverage abroad. They claim this resolution "further illustrates Congress' desire to assure that American citizens abroad enjoy to the maximum extent possible, the same employment opportunity they enjoyed within the United States." Brief of *Amici Curiae* NAACP Legal Defense Fund, *et al.* at 15. But in so doing, *amici* proverbially "put the cart before the horse."

First, Senate Resolution 323 simply is not relevant to Title VII. The resolution has no force or effect of law, since it was a resolution, rather than a bill, and it was not passed by both Houses. Second, the resolution was passed nearly ten years *before* the passage of Title VII. Third, it has little, if anything, to do with employment discrimination and deals only with religious affiliation. Finally, nowhere in the legislative history of Title VII

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[17] Senate Resolution 323 states:

> Whereas the protection of the integrity of United States citizenship and of the proper rights of United States citizens in their pursuit of lawful trade, travel, and other activities abroad is a principle of United States sovereignty; and
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> Whereas it is a primary principle of our Nation that there shall be no distinction among United States citizens based on their individual religious affiliations and since any attempt by foreign nations to create such distinctions among our citizens in the granting of personal or commercial access or other rights otherwise available to the United States citizens generally is inconsistent with our principles; Now therefore, be it
>
> *Resolved*, That it is the sense of the Senate that it regards any such distinctions directed against the United States citizens as incompatible with the relations that should exist among friendly nations, and that in all negotiations between the United States and any foreign state every reasonable effort should be made to maintain this principle.

S. Res. 323, 84th Cong., 2d Sess. (1956) (*quoted in* 102 Cong. Rec. 14330 (July 25, 1956)).

or in the congressional debates is there any reference to this resolution.

In essence, the NAACP, *et al.*, characterize S. Res. 323 as a comprehensive piece of legislation which prohibited employment discrimination. But if the resolution was intended to have that effect, Congress would have had no need to enact Title VII. It is therefore illogical to assume that Congress in 1956, *a priori*, intended to apply Title VII extraterritorially in 1964, or vice versa, particularly where Congress adopted no such specific language in Title VII. If anything, the *absence* of any discussion concerning the resolution in the 1964 debates and legislative history of Title VII affirms, rather than negates, the view that Congress did *not* intend Title VII to be extraterritorially applied.

The other policy arguments of petitioner Boureslan and the NAACP Legal Defense Fund, *et al.*, center around the notion that it is necessary to press for nondiscrimination abroad in order to assure nondiscrimination at home. Br. at 16-24. In their view, the majority opinion below allows employers to transfer their domestic employees overseas so they can "launder" their discrimination. NAACP Brief at 21. In support of this idea, *amici* specifically discuss testimony presented in support of the public accommodations laws in 1963, and generally allude to the United States' foreign policy concerns in international markets. *See* NAACP Legal Defense Fund Brief at 18-22, 25-30.

Their inference is flawed for several reasons. First, the NAACP Legal Defense Fund *et al.*, assume that American employers affirmatively will engage in discrimination abroad, yet cite no support for this broad assertion. From a practical standpoint, it is very costly to send workers overseas and then pay for their return. Also, employers often must specially train workers for overseas assignments and provide them with special language training, compensation, terms and other conditions of

employment. *See generally* Note, *Yankees Out of North America: Foreign Employer Job Discrimination Against American Citizens*, 83 Mich. L. Rev. 237 (1984) (discussing whether business and cultural familiarity requirements may be necessary to insure that managers can successfully integrate the Japanese management style with American practices). The costs of such efforts are higher than those associated with domestic employment. At a minimum, the economic costs of discrimination abroad are prohibitive, and serve as effective deterrents to discourage rather than encourage employers to engage in such practices. Thus, it would make little sense for an employer to send a person of a certain race, sex, or religion overseas just to be able to discriminate once the person was outside U.S. territory.[18]

The more plausible scenario posed by petitioner Boureslan and various amici involves the United States employer who makes the decision to deny overseas opportunities to U.S. workers. Indeed, the NAACP Legal Defense Fund's brief acknowledges that "many decisions regarding positions abroad are in fact made in the United States." Br. at 18. In that situation, however, the individual's relevant work station would be this country, thus making the employer subject to Title VII. *Cf., Pfeiffer v. Wm. Wrigley Jr. Co.*, 755 F.2d at 559 (Judge Posner).[19]

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[18] The amici NAACP L.D.F., *et al.*, argue that protected individuals who know they will be discriminated against overseas will refuse such assignments, thus employers would have "to pay a premium to induce potential employees to work abroad." Br. at 20. We know of no situation where that has occurred, nor do any of the amici cite to any employer that has been willing to tolerate such costs. No employer, moreover, is likely to escape Title VII if it pursues such a policy, for, as shown below, discrimination occurring within the U.S. will be covered by Title VII.

[19] *See also, Abrams v. Baylor College of Medicine*, 805 F.2d 528 (5th Cir. 1986) (Title VII violated by exclusion of Jewish doctors from rotations to Saudi Arabia); *Kern v. Dynalectron Corp.*, 577 F. Supp. 1196 (N.D. Tex. 1983), *aff'd*, 746 F.2d 810 (5th Cir. 1984) (employer did not violate Title VII by requiring membership in Islamic faith for pilots flying into Mecca); EEOC Decision No. 84-2, Empl. Prac. Dec. (CCH) ¶ 6840 (December 2, 1983) (Foreign company that recruits in the U.S. for employment outside the country is covered by Title VII): EEOC Decision No. 77-1, Empl. Prac. Dec. (CCH) ¶ 6557 (October 13, 1976) (Title VII applies to religious discrimination against a Canadian employee of the Canadian operations of a U.S. employer where the employee makes round trips between the U.S. and Canada).

CONCLUSION

For the foregoing reasons, EEAC respectfully urges the Court to affirm the decision of the en banc court below.

Respectfully submitted,

ROBERT E. WILLIAMS
DOUGLAS S. MCDOWELL *
EDWARD E. POTTER, P.C.
MCGUINESS & WILLIAMS
1015 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005
(202) 789-8600
Attorneys for the Amicus Curiae, Equal Employment Advisory Council

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* Counsel of Record